No. 05-344

IN THE

Supreme Court of the United States

JAKE GREGORY,

Petitioner,

v.

JULIAN C. LEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner, FBI Special Agent Jake Gregory, allegedly caused respondent's arrest pursuant to a Florida warrant issued under a name respondent was using. Addressing Agent Gregory's claim of qualified immunity, the Ninth Circuit did not identify disputes about the objective, historical information before Agent Gregory (what Gregory observed, saw, and heard) at the time he acted. Nor did it address whether that information, objectively assessed through the eyes of a competent officer, could reasonably have been thought sufficient to justify arrest. Instead, it denied qualified immunity because respondent alleged that Gregory, based on that information, "knew" respondent was innocent and that the warrant was for (or should have been for) respondent's brother. The question presented is:

Whether the lawfulness of a seizure under the Fourth Amendment, and the availability of qualified immunity, may turn on allegations that the officer subjectively inferred from the information before him—and thus "knew"—that the arrestee was innocent, without regard to whether, objectively assessed, the information supported probable cause or a reasonably competent officer could have so concluded.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Jake Gregory was appellant in the court of appeals and a defendant in the district court. Respondent Julian C. Lee was appellee in the court of appeals and plaintiff in the district court. The United States of America and the Federal Bureau of Investigation were defendants in the district court.

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Federal Bureau of Investigation Special Agent Jake Gregory respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., *infra*, 1a-10a) is reported at 363 F.3d 931 (9th Cir. 2004). The district court's opinions (App., *infra*, 11a-28a, 29a-50a) are unreported.

JURISDICTION

The court of appeals entered judgment on April 7, 2004, and denied a petition for rehearing on April 15, 2005 (App., *infra*, 51a). On July 6, 2005, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including August 13, 2005. On August 4, 2005, Justice O'Connor further extended the time to and including September 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of the United States Constitution are set forth in the Appendix at App., *infra*, 53a.

STATEMENT OF THE CASE

This case concerns whether a law enforcement officer's right to qualified immunity in a Fourth Amendment case depends on his state of mind. In the decision below, the Ninth Circuit denied qualified immunity because of a dispute over whether the government official had actually *concluded* or *inferred*—and thus "knew"—that respondent was innocent when he caused respondent's arrest, without regard to whether the official's undisputed observations (what he saw, read, and heard) otherwise supported probable cause. That holding squarely conflicts with decisions of the First Circuit and improperly injects into Fourth Amendment and qualified immunity determinations precisely the subjective inquiry into mental states that this Court excised long ago.

1. Petitioner Special Agent Jake Gregory is a 15-year veteran of the FBI. In 1999, he was assigned to interview respondent Julian Christopher Lee as part of a nationwide effort to locate respondent's brother, fugitive Robert Q. Lee. App., *infra*, 1a, 3a; C.A. E.R. 259. After determining that respondent used the name "Christopher Lee" and that a "Christopher Lee" was residing in Encinitas, California, Agent Gregory located and visited respondent's residence on April 21, 2000. App., *infra*, 4a; C.A. E.R. 79. Respondent was not home. Agent Gregory left his business card with a request that "Christopher Lee" call him. App., *infra*, 4a; C.A. E.R. 68, 260. Respondent called later that day and asked whether he was legally required to speak with Agent Gregory. Gregory told respondent that he was not required to talk. At that point, respondent angrily told Agent Gregory to stop harassing him, used profanity, and abruptly hung up. App., *infra*, 4a; C.A. E.R. 260.

His suspicions aroused by respondent's hostility, Agent Gregory recalled materials indicating that there was an outstanding Florida warrant for "Christopher Lee," the name that respondent "Julian Christopher Lee" was using. C.A. E.R. 79, 260. Agent Gregory obtained a copy of the warrant, which was dated December 4, 1998. The warrant sought the arrest of a "Christopher Lee" on aggravated battery and burglary charges in Dade County, Florida. C.A. E.R. 75. The Social Security number, date of birth, race, and gender listed on the warrant were all exact matches for respondent. App., *infra*, 4a.

At the same time, FBI records indicated that respondent's brother, Robert Lee, might have used "Christopher Lee" as an alias. A July 1999 FBI bulletin included "Christopher Lee" in a list of five names and corresponding Social Security numbers used "at various locations * * * in different parts of the country by various individuals," adding that "it is not known if" Robert Lee "is one of these individuals." C.A. E.R. 71; see App., *infra*, 3a. In addition, a February 7, 1997, letter from a New Jersey state prosecutor's office stated that Robert Q. Lee might be in Alabama using the name "Christopher Lee" and a March 7, 1967, birth date—respondent's birth date. App., *infra*, 3a; C.A. E.R. 84.

In addition, the warrant's description of Christopher Lee did not match respondent perfectly. For example, the warrant listed Christopher Lee's height as 6' 1", while respondent's California driver's license listed his height as 6' 3". App., *infra*, 3a; C.A. E.R. 64, 83, 89. The warrant description did not match respondent's brother in that respect either, since respondent's brother was only 6' tall. C.A. E.R. 85. The weight differences were greater. The Florida warrant listed Christopher Lee's weight as 200 pounds, 70 pounds less than the weight listed on respondent's driver's license. App., *infra*, 4a; C.A. E.R. 83, 89. At the same time, that 200-pound weight was significantly more than the 160-

and 180-pound weights listed for respondent's brother. App., *infra*, 3a; C.A. E.R. 85.

One factor—beyond the matching Social Security number and birth date—pointed decisively toward the conclusion that respondent and not his brother was the person sought by Florida authorities. The FBI description of respondent's brother indicated that he had multiple identifying marks, including scars on his neck and thigh and a tattoo on his left forearm. C.A. E.R. 85. The Florida warrant's "scars or tattoos" line did not list any identifying marks. *Id.* at 83.

When Agent Gregory contacted Florida authorities about the warrant, they told him the warrant was current and that they were interested in extraditing "Christopher Lee." C.A. E.R. 260. Agent Gregory gave a copy of the warrant to San Diego authorities and told them that he believed he had located Christopher Lee. App., *infra*, 4a. Gregory then sent a memorandum to the FBI's Philadelphia Office explaining that, after respondent had "indicated he would not submit to an interview * * * and hung up," further "investigation disclosed an outstanding local arrest warrant for Christopher Lee * * * in Dade County, FL." C.A. E.R. 75. "In view of [respondent's] hang-up phone call *and status as a fugitive himself*," Agent Gregory continued, respondent "appears unlikely to provide any information regarding his brother, Robert Lee." C.A. E.R. 76 (emphasis added). Agent Gregory stated that he would not conduct "any further investigation." *Ibid.* Agent Gregory added that, if San Diego authorities were to apprehend respondent, he would "attempt to interview" respondent and apprise the FBI's Philadelphia Office "of the results." *Ibid.*

On May 4, 2000, San Diego authorities arrested respondent. App., *infra*, 5a. Agent Gregory visited respondent in jail and told him that, if he provided information on his brother's whereabouts, Agent Gregory would advise Florida authorities of his cooperation. *Ibid.* Respondent offered no

information about his brother and, according to respondent, protested his innocence. Believing that respondent was about to be extradited to Florida, Agent Gregory told respondent to "have a nice trip to Florida." *Ibid.*

On May 8, 2000, respondent posted bail. About two weeks later, respondent's attorney called Agent Gregory claiming that this was a case of mistaken identity. Gregory contacted Florida authorities and sent them information about and photographs of respondent's brother, Robert Q. Lee. App., *infra*, 5a. Florida authorities compared those photographs to their mug shots and decided that Robert Lee, rather than respondent, had committed the assault and burglary in Florida. When Agent Gregory relayed that information to the San Diego District Attorney's office, all charges against respondent were dropped. *Ibid.*

2. In April 2001, respondent filed this damages action against Special Agent Gregory under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671, *et seq.* The complaint alleged, among other things, that Agent Gregory had caused respondent to be arrested even though Gregory "knew [respondent] to be innocent." C.A. E.R. 9 (First Amended Complaint).

Agent Gregory moved for summary judgment, asserting qualified immunity. Citing *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001), the district court analyzed qualified immunity in two steps. First, the court asked whether the facts, viewed in the light most favorable to respondent, established the violation of a constitutional right. Second, the court asked whether, assuming a constitutional violation, Agent Gregory should be entitled to qualified immunity because, at the time he acted, the law did not "clearly establish[]" that his "conduct was unlawful in the circumstances of the case." App., *infra*, 18a (quoting *Saucier*, 533 U.S. at 201).

Addressing the first question, the district court rejected Agent Gregory's contention that the arrest was constitutional because there was a facially valid warrant for respondent's arrest. App., *infra*, 19a-20a. The district court likewise rejected Agent Gregory's contention that, at the very least, he had probable cause to believe that respondent was the person named in the warrant. *Id.* at 20a-21a. The district court did not deny that "the warrant matched [respondent's] name, gender, race, date of birth and Social Security number." *Id.* at 19a-20a. And it did not address whether a reasonably prudent person confronted with the warrant, as well as the other evidence, could reasonably conclude that the warrant sought respondent's arrest. Instead, the court held that a trial was necessary to resolve respondent's claim "that Agent Gregory [had] procured [respondent's] arrest *knowing* that he was not the man named in the Florida warrant in order to gather information on [respondent's] brother." *Id.* at 21a (emphasis added). "Whether Agent Gregory knew [respondent] was the person in the Florida warrant is an issue for the finder of fact, making summary judgment inappropriate." *Ibid.*

The district court also rejected Agent Gregory's claim of qualified immunity. App., *infra*, 21a-22a. The court acknowledged Gregory's argument "that under an objective view of the facts"—including the match between the warrant and respondent with respect to name, birth date, Social Security number, race, gender, and the similarity in heights, along with any disparities in the descriptions—"a reasonable officer could have concluded that the arrest warrant applied to [respondent]." *Id.* at 22a. But the court denied qualified immunity because "Agent Gregory has not addressed the law relating to knowingly arresting the wrong person." *Ibid.* The court concluded:

> In essence, Agent Gregory argues that he reasonably, although mistakenly, believed that the person named in [the] Florida arrest warrant was [respondent].

> [Respondent] argues that [Agent Gregory] knew the person named in the warrant was not [respondent] but that Agent Gregory procured [respondent's] arrest for the purpose of pressuring [him] to provide information on his brother. This is a factual dispute that is to be determined by a finder of fact, and not appropriate for summary judgment.

App., *infra*, 22a-23a.

3. Agent Gregory appealed, and the Ninth Circuit affirmed. App., *infra*, 1a-11a. Like the district court, the Ninth Circuit first addressed whether respondent had shown a constitutional violation. In answering that question, the Ninth Circuit did not identify any dispute about the evidence before Agent Gregory—*i.e.*, what Agent Gregory observed, saw, and heard. Nor did the Ninth Circuit inquire whether Agent Gregory's conduct was reasonable because he had a warrant that commanded respondent's arrest and set forth respondent's name, Social Security number, birth date, race, gender, absence of identifying marks, and approximate height. And the Ninth Circuit did not address whether the *totality of the information* available to Agent Gregory—including the matching information in the warrant as well as the other data—established probable cause to arrest.

Instead, the Ninth Circuit joined the district court in holding that summary judgment was inappropriate because respondent alleged that "Gregory actually *knew* the Florida warrant applied not to [respondent Julian Lee], but to Robert." App., *infra*, 7a (emphasis added). "Knowingly arresting the wrong man pursuant to a facially valid warrant issued for someone else violates rights guaranteed by the Fourth Amendment." *Id.* at 8a. "Gregory's contention that his actual knowledge should be ignored," the court of appeals added, "is completely without merit." *Ibid.*

The Ninth Circuit noted respondent's allegation that Gregory had arrested respondent "to pressure him for

information about Robert," but agreed that "allegations of ulterior *motives* cannot invalidate police conduct that is justified by probable cause." App., *infra*, 7a. Nonetheless, the Ninth Circuit distinguished intent and motive from knowledge, stating that Agent Gregory's conduct was not "impugned because of his motive, but because of his claimed *knowledge* that [respondent] was not the person named in the Florida arrest warrant." *Ibid.* Thus, despite the absence of any dispute over the information before Gregory, the Ninth Circuit remanded for a trial on whether Agent Gregory had concluded—and thus "knew"—that respondent was innocent when he caused respondent's arrest.[1]

The Ninth Circuit then turned to Agent Gregory's claim that he did not violate respondent's "clearly established" rights and is therefore entitled to qualified immunity. App., *infra*, 8a-10a. Once again, the court did not identify any disputes over the objective information available to Agent Gregory. Once again, it did not ask whether "a reasonable officer" confronted with that information *could have believed* that there was, as an objective matter, sufficient cause to arrest respondent as the person named in the warrant. See *Saucier*, 533 U.S. at 202. Instead, the Ninth Circuit asked whether a reasonable officer could have believed "that he is entitled *knowingly* to arrest the wrong man pursuant to a facially valid warrant." *Id.* at 9a (emphasis added). Answering that question in the negative, the Ninth Circuit held that "[k]nowingly arresting the wrong person" is self-evidently unlawful "because an officer cannot have probable cause to believe the person arrested has committed the crime described in the warrant when he

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[1] In the court of appeals, respondent relied on photographs of respondent and his brother. It is undisputed, however, that the Florida warrant did not include a photograph, and Agent Gregory did not see respondent or a picture of respondent until after his arrest. C.A. E.R. 79; Gov't C.A. Reply Br. 22-23. The Ninth Circuit, in any event, placed no reliance on the photographs.

knows that the warrant identifies another person." *Ibid.* The Ninth Circuit stated that it could not "determine whether Gregory knew or did not know he was causing the arrest of the wrong man." *Id.* at 10a. "That is an issue reserved to the trier of fact at trial." *Ibid.*

Agent Gregory filed a petition for rehearing. The Ninth Circuit ordered a response on August 24, 2004, and denied the petition on April 15, 2005.

REASONS FOR GRANTING THE PETITION

This Court has long held that, because Fourth Amendment reasonableness and qualified immunity are *objective* tests, they must be resolved in light of the information before the officer, without regard to the officer's subjective conclusions or motivations. In this case, the Ninth Circuit found no disputes regarding the evidence before Special Agent Gregory (what Gregory saw, read, and heard). There thus was no dispute that, at the time Agent Gregory acted, he had before him a Florida arrest warrant issued under the name respondent was using, with respondent's Social Security number, date of birth, race, gender, and approximate height, together with other information, such as a weight disparity and data concerning respondent's brother's aliases. The Ninth Circuit, however, refused to address whether that information was, as an objective matter, sufficient to justify arrest. It likewise refused to address whether, for qualified immunity purposes, a reasonably competent officer could have thought that information sufficient to justify arrest. Instead, the Ninth Circuit held that a dispute over the officer's *subjective assessment* of the information before him precluded qualified immunity. In particular, the Ninth Circuit held that qualified immunity was unavailable because respondent alleged that Agent Gregory "knew"—*i.e.*, that Agent Gregory had concluded from the information before him—that respondent was innocent.

That holding squarely conflicts with decisions of the First Circuit. Time and again, the First Circuit has held that the arresting officer's "subjective" assessments of the facts—*e.g.*, conclusions drawn in his own mind pertaining to guilt or innocence—are irrelevant to Fourth Amendment and qualified immunity inquiries. Instead, the only issue is the information before the officer—what he saw, heard, read, and was told. If that information, *objectively assessed*, was sufficient to justify arrest or a competent officer could have thought it sufficient, the arresting officer is entitled to immunity.

The Ninth Circuit's contrary approach conflates knowledge with subjective belief and reintroduces precisely the inquiry into subjective mental processes that this Court excised from the Fourth Amendment and qualified immunity inquiries long ago. The Ninth Circuit's decision also punches a gaping hole in the qualified immunity defense. If officers are judged based what they "actually knew" in the sense of what they *subjectively concluded* from the evidence, virtually every *Bivens* and Section 1983 case will have to be resolved by a jury, eviscerating qualified immunity as "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985). In almost any mistaken arrest case, the plaintiff will be able to point to some allegedly exculpatory information and urge that the officer "knew" he was innocent.

The question here—whether Fourth Amendment reasonableness or qualified immunity permits "inquiry into" the thoughts in "the officer's mind," Resp. C.A. Br. 16—is important and recurring. Officers confront the risk of seizing the "wrong" person virtually every time they execute a warrant, a risk that has been heightened in recent years by dramatic increases in identity theft (like that perpetrated by respondent's brother). Yet, under the decision below and others like it, plaintiffs may now avoid qualified immunity and force the officer to endure a trial in

virtually every mistaken arrest case, no matter how objectively reasonable the officer's conduct may be in light of the evidence before him, merely by pointing to a supposedly exculpatory fact and alleging that the officer effected the seizure "knowing"—*i.e.*, after subjectively concluding—that the suspect was innocent. "If an officer executing an arrest warrant must do so at peril of" litigation "if there is any discrepancy [in] the description [in] the warrant * * *, many a criminal will slip away." *Johnson* v. *Miller*, 680 F.2d 39, 41 (7th Cir. 1982). That is precisely the effect the Ninth Circuit's decision will have.

I. The Ninth Circuit's Decision Conflicts With This Court's Decisions Holding That Fourth Amendment And Qualified Immunity Inquiries Are Objective

A. The Ninth Circuit's Decision Improperly Introduces Subjective Inquiries Into The Fourth Amendment

Because the "touchstone of the Fourth Amendment is reasonableness" rather than perfection, *Florida* v. *Jimeno*, 500 U.S. 248, 250 (1991), the "Constitution does not guarantee that only the guilty will be arrested," *Baker* v. *McCollan*, 443 U.S. 137, 145 (1979); see *Graham* v. *Connor*, 490 U.S. 386, 396 (1989); *Hill* v. *California*, 401 U.S. 797 (1971). Instead, an arrest is lawful if there is probable cause—if, at the time of arrest, "the facts and circumstances within [the officer's] knowledge" were "sufficient to warrant a prudent man in believing" that a crime had been committed. *Saucier* v. *Katz*, 533 U.S. 194, 207 (2001) (quoting *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964)); *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991). Likewise, officers "executing an arrest warrant" need not "investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent." *McCollan*, 443 U.S. at 145-146.

In deciding whether there is probable cause, courts must first look to the information available to the arresting officers. *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996). The question is "whether these *historical facts*, viewed from the standpoint of an *objectively reasonable* police officer, amount to * * * probable cause." *Ibid.* (emphasis added). Reasonableness is thus "measured in objective terms by examining the totality of the circumstances," *Ohio* v. *Robinette*, 519 U.S. 33, 39 (1996), and an officer's subjective intent or motivation cannot "invalidate[] objectively justifiable behavior under the Fourth Amendment," *Whren* v. *United States*, 517 U.S. 806, 812 (1996).

Just last Term, this Court reemphasized the objective nature of the Fourth Amendment inquiry:

> As we have repeatedly explained, "the fact that the officer does not have the *state of mind* which is hypothecated by the reasons which provide the legal justification for the officer's actions does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Whren*, *supra*, at 813 * * * . "The Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever the subjective intent.*" *Whren*, *supra*, at 814. "[E]venhanded law enforcement is best achieved by the application of *objective* standards of conduct, rather than standards that depend upon *the subjective state of mind* of the officer." *Horton* v. *California*, 496 U.S. 128, 138 (1990).

Devenpeck v. *Alford*, 125 S. Ct. 588, 594 (2005) (emphasis added).

The Ninth Circuit's decision in this case cannot be reconciled with that standard. The Ninth Circuit did not identify disputes about the evidence before Agent Gregory—what Gregory observed, heard, and saw. Nor did the Ninth Circuit evaluate whether the observable information estab-

lished probable cause or otherwise justified respondent's arrest under the Florida warrant. The Ninth Circuit thus failed to ask whether, as an objective matter, it is reasonable to arrest in reliance on a warrant that (1) is issued under a name used by the arrestee; (2) includes the arrestee's Social Security number, birth date, race, gender, and approximate height (within 2 inches); and (3) omits scars, tattoos, or other identifying marks that characterize the other possible culprit (here, respondent's brother). Nor did the Ninth Circuit evaluate whether other information, such as the disparity in weights or indications that respondent's brother might have appropriated respondent's identity in other contexts, rendered reliance on the Florida warrant unreasonable.

Instead, the Ninth Circuit held that respondent had alleged a Fourth Amendment violation by asserting that Agent Gregory "actually knew"—*i.e.*, that Gregory subjectively concluded from the undisputed facts before him—"that the Florida warrant applied not to [respondent], but to [respondent's brother] Robert." App., *infra*, 8a. But the Ninth Circuit did not suggest that Gregory somehow witnessed the Florida crimes, giving him personal knowledge of who committed them. Rather, the Ninth Circuit found a material issue of fact over what Agent Gregory *concluded* from the evidence before him—requiring a trial to determine whether Gregory in fact "believed that the person named in [the] Florida arrest warrant was [respondent]" or whether he instead "knew the person named in the warrant was not [respondent]." *Id.* at 22a. That, however, "is not knowledge, but subjective belief." *Brady* v. *Dill*, 187 F.3d 104, 113 (1st Cir. 1999).

Under this Court's cases, Fourth Amendment reasonableness turns not on the subjective question of what the officer *thought* or *concluded*, but rather on the *objective* question of what the officer *observed*. If the historical facts available to Agent Gregory were sufficient to support a

reasonably prudent person in concluding that respondent had committed a crime or otherwise was the person named in the Florida warrant, the arrest was lawful. An arrest cannot be rendered unconstitutional by the "fact that the officer *does not have the state of mind*," *i.e.*, the subjective belief, "which is hypothecated by the [objective] reasons which provide the legal justification for the officer's action * * * , as long as the circumstances, *viewed objectively*, justify that action." *Whren*, 517 U.S. at 813 (emphasis added). "Subjective concepts * * * have no proper place in that inquiry." *Graham*, 490 U.S. at 399.

Indeed, even where officers actually "testif[y] * * * that there was no probable cause," that subjective belief does not preclude the evidence from being sufficient to establish probable cause. *Florida* v. *Royer*, 460 U.S. 491, 507 (1983) (plurality). *A fortiori*, an arrestee's claim that the officer somehow believed that he was innocent cannot preclude the evidence from being sufficient to establish probable cause for arrest.

B. The Decision Below Erroneously Reintroduces Into Qualified Immunity The Subjective Inquiry This Court Excised In *Harlow*

In *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that qualified immunity protects government officials from suit unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Conduct violates "clearly established rights" only if the violation is so obvious that no reasonable officer could have thought the conduct lawful under the circumstances before him. Thus, even if an officer violates the Constitution, immunity shields the officer from suit and liability unless, "*on an objective basis*, it is obvious that *no reasonably competent officer* would have concluded" that his actions were constitutional at the time they were undertaken. *Malley* v. *Briggs*, 475 U.S. 335, 341

(1986) (emphasis added). "[I]f officers of reasonable competence could disagree on" the conduct's lawfulness, "immunity should be recognized." *Id.* at 341.

Qualified immunity reflects a careful balance between constitutional rights and the need for effective law enforcement. *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974). "Implicit in the idea that officials have some immunity * * * is a recognition that they may err. The concept of immunity assumes * * * that it is better to risk some error and possible injury" than for officers "not to * * * act at all." *Id.* at 242. Qualified immunity ensures that the threat of litigation does not divert public officials from "pressing public issues," deter "able citizens from acceptance of public office," or "dampen the ardor" with which officers discharge important law enforcement duties. *Harlow*, 457 U.S. at 814.

Before this Court decided *Harlow*, the test for qualified immunity required *subjective* good faith. *Harlow*, 457 U.S. at 814. *Harlow*, however, "rejected the inquiry into state of mind in favor of a wholly objective standard." *Davis* v. *Scherer*, 468 U.S. 183, 191 (1984); *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987) (*Harlow* "completely reformulated qualified immunity * * *, replacing the inquiry into subjective malice [with] an objective inquiry into the legal reasonableness of the official action."). The Court explained that, for qualified immunity to be effective, it must protect officers not merely from damages but also from discovery and the other burdens of litigation that can be "peculiarly disruptive [to] effective government" and a deterrent to decisive action. *Harlow*, 457 U.S. at 817. Qualified immunity therefore must be capable of early resolution, generally before trial. *Id.* at 815-816. Because subjective "thought processes" only "rarely can be decided by summary judgment," the Court in *Harlow* held that it was necessary to "defin[e] the limits of qualified immunity essentially in objective terms." *Id.* at 816, 819. This Court has repeatedly reaffirmed that qualified immunity must be decided "on an

objective basis" whenever possible. *Malley*, 475 U.S. at 341; *Anderson*, 483 U.S. at 641; *Saucier*, 533 U.S. at 202.

Consequently, the question here is not the subjective question whether *Agent Gregory believed* respondent was guilty or innocent. Instead, the "question is the objective inquiry whether *a reasonable officer could have believed*" that the arrest "was lawful in light of clearly established law and *the information* the officers possessed." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (emphasis added). The Ninth Circuit, however, never made that inquiry. It did not ask whether a reasonable officer could have believed the arrest lawful in light of "the information" that Agent Gregory "possessed." It thus did not inquire whether a reasonable officer standing in Gregory's shoes—holding a Florida arrest warrant issued under the name respondent was using, with respondent's Social Security number, date of birth, gender, race, and approximate height, and no indication of identifying marks—could have thought the arrest lawful despite the weight differential and information about respondent's brother. Instead, the Ninth Circuit denied qualified immunity because respondent alleged that Gregory, based on that information, had concluded and thus "knew" that respondent's brother, rather than respondent, committed the crimes in Florida. App., *infra*, 7a. "[K]nowingly causing the arrest of the wrong person," the Ninth Circuit stated, "is plainly unlawful." *Id.* at 9a.

That conception of "knowledge" as encompassing the subjective conclusions the officer allegedly drew in his own head, as opposed to the observable facts and information before him, radically alters the objective, reasonable-officer test mandated by this Court's cases. It reintroduces the subjective inquiry this Court eliminated in *Harlow*, replacing the objective inquiry into what an officer *observed* with an unworkable effort to probe the officer's mind to determine what he believed or concluded. That contravenes this Court's admonition that the defendant's own "subjec-

tive beliefs" are "irrelevant." *Anderson*, 483 U.S. at 641. It likewise contravenes this Court's observation that, although qualified immunity requires an inquiry into "the *information* possessed by" the officer, that inquiry does not "reintroduce into qualified immunity analysis the inquiry into officials' subjective intent that *Harlow* sought to minimize." 483 U.S. at 641 (emphasis added). Rather, the "relevant question" is "the *objective* (albeit fact-specific) question whether *a reasonable officer could have believed*" the conduct "to be lawful, in light of clearly established law and the *information* [the defendant] possessed"—not whether the particular defendant could have thought it lawful in light of the subjective conclusions he allegedly drew, in his own mind, from the information before him. *Ibid.* (emphasis added).

The Ninth Circuit attempted to distinguish this Court's cases as merely proscribing inquiries into "ulterior motives." App., *infra*, 7a. Here, the Ninth Circuit urged, "Gregory's actions are impugned not because of his motive, but because of his claimed *knowledge* that respondent was not the person named in the Florida arrest warrant." *Ibid.* That purported distinction makes no sense. The Ninth Circuit did not identify any dispute about the information and historical facts available to Agent Gregory—what Gregory observed, saw, or heard—and thus about the facts that Agent Gregory "knew." The only dispute is whether Agent Gregory, based on those facts, *concluded* that respondent's brother rather than respondent was the one who had committed the offenses in Florida. It is precisely such probing into the officer's mental processes—not into his "knowledge, but [into his] subjective belief," *Brady*, 187 F.3d at 113—that this Court's cases proscribe.

Indeed, under the Ninth Circuit's approach, lawsuits challenging otherwise identical arrests, based on the same information, would be resolved differently if the jurors concluded that, in one, a more intelligent officer realized (and

thus "knew") he was arresting the wrong person while, in the other, they concluded that a less intelligent officer did not. There is no basis for making an officer's liability turn on what jurors believe he was thinking rather than on the information before him when he acted. To the contrary, that creates precisely the problem—the need for every case to go to trial to determine the officer's subjective beliefs—that *Harlow's* move to an objective standard was meant to avoid.[2]

II. The Courts Of Appeals Are Divided On The Relevance Of An Officer's Subjective Conclusions

The decision below exacerbates conflict over whether an officer's subjective assessments of the information before him—what the officer allegedly *concluded* from objective observations—can be considered "knowledge" for purposes of Fourth Amendment and qualified immunity determinations. The First Circuit has repeatedly held that a plaintiff

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[2] The Ninth Circuit also erred in holding that qualified immunity was unavailable simply because it could articulate a clear legal rule in the abstract—that officers cannot "knowingly arrest the wrong person pursuant to a facially valid warrant for someone else." In *Anderson*, this Court held that qualified immunity may not be denied merely because "the relevant 'legal rule'" was "clearly established" at a high level of generality. *Anderson*, 483 U.S. at 639. Immunity may be denied only if "the right" was "'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Id.* at 640 (emphasis added); *Saucier*, 533 U.S. at 202 (inquiry to be conducted at a "particularized" level "in light of the specific context of the case"); *Brosseau* v. *Haugen*, 125 S. Ct. 596, 599 (2004) (*per curiam*) ("inquiry must be undertaken in light of the specific context of the case, not as a broad proposition") (quotation marks omitted). Thus, the critical inquiry here is whether, "in light of * * * the *information*" Gregory "possessed," a "reasonable officer could have believed [the arrest] to be lawful," *Anderson*, 483 U.S. at 641 (emphasis added)—not whether an officer could, in the abstract, believe it lawful "knowingly" to arrest the wrong person.

cannot defeat qualified immunity by alleging that the arresting officer *knew* he was innocent, so long as another reasonable officer might have thought the objective information before him was sufficient to justify arrest. The Ninth Circuit reached the opposite result, creating a clear conflict and deepening the confusion in the federal courts.

A. The Ninth Circuit's Decision Squarely Conflicts With Decisions Of The First Circuit

1. The First Circuit has twice rejected precisely the argument accepted by the Ninth Circuit here—first in *Floyd* v. *Farrell*, 765 F.2d 1 (1985), and then in *Brady* v. *Dill*, 187 F.3d 104 (1999).

In *Floyd*, the officer arrested the plaintiff, Barry Floyd, after he was stopped while driving a stolen car. 765 F.2d at 3. Floyd alleged that the arrest was wrongful because his "comments * * * at the time of his arrest made it clear that he did not know the car was stolen." *Id.* at 4, 6. Apparently, the officer made statements supporting that claim, admitting that he was "only holding Floyd to 'flush out' Floyd's father," who was a fugitive. *Id.* at 6; compare App., *infra*, 20a (denying qualified immunity because of respondent's assertion that "Agent Gregory knew the warrant pertained to [respondent's] brother and procured the arrest to obtain information on [respondent's] brother.").

The First Circuit held that such assertions could not defeat qualified immunity if the evidence before the officer, objectively assessed, was arguably sufficient to establish probable cause. Qualified immunity, the First Circuit explained, does not permit an inquiry into the officer's "subjective state of mind" to determine whether the officer's "own evaluation of the facts before him" had led him to "believe that Floyd did not know the car was stolen." *Floyd*, 765 F.2d at 8. The First Circuit explained:

> The subjective state of mind at issue here is [the officer's] assessment of the facts before him, *i.e.*, did

> he believe that Floyd did not know the car was stolen. * * * The *Harlow* standard requires that we make an objective analysis of the reasonableness of conduct in light of the facts actually known to the officer and *not consider the individual officer's subjective assessment of those facts.* * * * It was to prevent such inquiries that the Supreme Court eliminated from the test for qualified immunity consideration of "permissible intentions."

Ibid. (emphasis added). The proper inquiry, the court ruled, was whether the defendant "or *any other officer in his shoes could reasonably have believed* that Floyd knew the car was stolen." *Id.* at 5 (emphasis added). Because a competent officer in the defendant's shoes could have reached that conclusion, the First Circuit held that the defendant was entitled to immunity. *Id.* at 5-6.

In *Brady*, the First Circuit again squarely rejected efforts to inject an officer's subjective assessments of the facts before him—his subjective beliefs—into the Fourth Amendment and qualified immunity analyses. The similarity between the facts in *Brady* and this case could not be more striking. In *Brady*, as here, the plaintiff was arrested under a warrant that gave his "name, date of birth, and Social Security number." 187 F.3d at 106. In *Brady*, as here, the warrant was issued in error because the plaintiff's brother had appropriated his identity. In that case, the plaintiff's brother, when stopped for drunk driving, had "palmed himself off" as the plaintiff. When the brother failed to appear for trial, a warrant was issued for the plaintiff. *Ibid.* In *Brady*, as here, the plaintiff sought to hold the officers liable for detaining him under the warrant despite "'actual knowledge' of his innocence." *Id.* at 113. Citing certain discrepancies, he argued that the officers had detained him even though they had determined that "he was a victim of mistaken identities" and thus had "come to 'know' that" he was innocent. *Id.* at 112, 113.

The First Circuit rejected that argument because it conflates "knowledge" with "subjective belief." The court observed that, absent a showing that the officers had been "percipient witnesses to the drunk driving incident"—and thus personally saw that it was committed by the plaintiff's brother and not the plaintiff—"the worst one can say about the" officers "is that they came to believe, with some degree of subjective certainty, that the man they had arrested, though named in the warrant, was innocent of the underlying [drunk driving] charge. This is not knowledge, but subjective belief * * * ." *Id.* at 113. "[T]his kind of subjective belief," the First Circuit held, is "irrelevant to Fourth Amendment probable cause analysis." *Ibid.* The officers were entitled to qualified immunity, the First Circuit further held, because they "scrupulously executed a judicial order—the arrest warrant that bore [the plaintiff's name]—according to its terms." *Id.* at 116. *Brady* thus recognizes and holds that, in the context of Fourth Amendment and qualified immunity cases, the term "knowledge" refers to (and permits consideration of) the objectively observable information before the officer, not what the particular officer allegedly concluded from his observations.

The Ninth Circuit here reached precisely the opposite result. Departing from *Floyd*, the Ninth Circuit declined to ask whether "another" reasonably competent "officer, standing in [Agent Gregory's] shoes and having the same information" that Agent Gregory had, "could reasonably have believed" that respondent was the person sought by Florida authorities when they issued the warrant. *Floyd*, 765 F.2d at 5. Instead, the Ninth Circuit held that the case turns on whether Gregory somehow came to believe and thus "knew" that respondent was innocent, because no reasonable officer would believe that he is "entitled knowingly to arrest the wrong man." App., *infra*, 9a. That is precisely what *Floyd* proscribes—efforts to defeat qualified immunity based on the officer's "subjective state

of mind," such as whether his "*own evaluation* of the facts" led him to believe that the arrestee was innocent.

Just like the defendants in *Brady*, moreover, Agent Gregory "scrupulously" relied on a facially valid warrant, allegedly causing the arrest of the person whose name, Social Security number, and birth date were set forth therein. *Brady*, 187 F.3d at 116. Agent Gregory, like the defendants in *Brady*, was not a "percipient witness" to the crimes specified in the warrant and thus could not "know" that respondent was innocent. *Id.* at 114. Consequently, as in *Brady*, the most that can be said is that, according to respondent, Agent Gregory "believe[d], with some degree of subjective certainty, that" respondent "was innocent of the underlying charge." *Ibid.* As the First Circuit held, that "is not knowledge, but subjective belief," and therefore "irrelevant." *Ibid.* The Ninth Circuit, by contrast, held that Agent Gregory's alleged subjective conclusion that respondent was innocent is "knowledge" that by itself defeats qualified immunity. It is difficult to imagine more diametrically opposed resolutions of the same question.[3]

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[3] The Ninth Circuit has adhered to that approach. For example, in *Henshaw* v. *Daugherty*, No. 04-15619, 125 Fed. Appx. 175, 2005 WL 756105 (9th Cir. March 23, 2005), the Ninth Circuit denied qualified immunity, relying on the plaintiff's allegation that the officers arrested him even though they "knew" (*i.e.*, they subjectively concluded) that the complaining witness had made up his story. Appellees' Br., 2004 WL 2097262 at 4, 8 (Aug. 12, 2004); Appellant's Reply Br., 2004 WL 2297712 at 3-4 (Sept. 8, 2004). Citing *Gregory*—and without asking whether a reasonable officer could have believed the complainant's story—the Ninth Circuit held that qualified immunity was unavailable because officers cannot "knowingly rel[y] on false information to manufacture probable cause * * *." 125 Fed. Appx. at 176, 2005 WL 756105, at *1.

B. The Lower Federal Courts Are In Disarray Over This Issue

The same conflict repeats itself throughout the courts of appeals and district courts. For example, in *Gay* v. *Wall*, 761 F.2d 175, 176 (1985), the Fourth Circuit held that a plaintiff may defeat qualified immunity by alleging that the officer "actually knew"—*i.e.*, subjectively concluded—that he was innocent despite facts arguably sufficient to establish probable cause. There, the plaintiff was arrested under a warrant when "two eye-witnesses identified [him] from a picture line-up as the robber who had shot a police officer" (although the police determined that his "fingerprints did not match those at the crime scene"). *Ibid.* Relying on the plaintiff's allegation that the officers, following his arrest, admitted that they had "no case" against him, that they "did not believe [he] was guilty," and that they planned to release him when they "found the right guy," the Fourth Circuit denied immunity. *Ibid.* Without addressing whether the evidence before the officer, objectively assessed, was arguably sufficient to justify detention, the court stated: The plaintiff "contends that the defendants had actual knowledge of his innocence, yet detained him until they could 'find the right man.' * * * If [the] allegation is true * * * the defendants' conduct may well be actionable under § 1983." *Id.* at 178-179.[4]

The Sixth Circuit likewise has held that qualified immunity is unavailable if the plaintiff alleges "that the officer knew she was the wrong person." *Sanders* v. *City of Flatwoods*, No. 90-5540, 1991 WL 100588, at *2 (6th Cir.

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[4] In *Brooks* v. *City of Winston-Salem*, 85 F.3d 178, 184 n.5, 185 (1996), the Fourth Circuit indicated that *Gay*, insofar as it found a substantive due process right to release *after* arrest, was overruled by *Albright* v. *Oliver*, 510 U.S. 266 (1994). See *Brady*, 187 F.3d at 110 (to the extent *Gay* can be read to address Fourth Amendment claims in the post-arrest context, "we must reject it").

June 11, 1991) (Table); see 6th Cir. R. 28(g) (allowing citation of unpublished opinions for "precedential value" if "there is no published opinion that would serve as well"). In that case, the plaintiff (Ellan T. Sanders) alleged that the officer had arrested her under a warrant issued for her daughter (Ellan P. Sanders), who lived at the same address. Claiming that the officer had offered to release her if she told him where her daughter was, the plaintiff asserted that the officer "knew the warrant" was intended for her daughter but detained her "to coerce her into divulging" her daughter's whereabouts. *Id.* at *3. Without addressing whether a reasonable officer could have thought the warrant was for plaintiff, the Sixth Circuit denied immunity: If "the arrest was made to coerce her into divulging the location of the person for whom the officer knew the warrant was actually intended, the unlawfulness of his actions should have been 'apparent' to him. No reasonable officer could have thought it lawful to arrest an innocent person under a warrant intended for another, hoping to learn the other person's whereabouts." *Ibid.* Those rulings, like the Ninth Circuit's in this case, cannot be reconciled with the First Circuit's decisions in *Floyd* and *Brady*.

The federal courts continue to grapple with this issue and reach conflicting results in case after case. Contrast *Egervary* v. *Young*, 159 F. Supp. 2d 132, 180 n.37 (E.D. Pa. 2001) (holding that an "examination of the 'information possessed' by the officials is an examination of their subjective thoughts," and ruling that only a jury could decide what those "subjective thoughts" were, *i.e.*, "what [defendants] knew based on the facts and circumstances"); *Hebein* v. *Young*, 37 F. Supp. 2d 1035, 1043 (N.D. Ill. 1998) (analysis of objective reasonableness "does take into account the subjective view of the defendant"), with *Fletcher* v. *Tom Thumb, Inc.*, No. Civ. 99-1680DWFSR, 2001 WL 893913 (D. Minn. Aug. 7, 2001) (holding that "qualified immunity stands or falls on the objective reasonableness of the offi-

cers' actions, not their subjective state of mind"; granting qualified immunity without "speculat[ing]" what the defendant "thought"). See also *Miller*, 680 F.2d at 42 (expressing uncertainty as to whether "it might be a * * * different case" if the plaintiff alleged that the officer "knew [the warrant was] based on mistaken identity"). This Court should grant the petition to resolve the conflict and confusion.

III. The Ninth Circuit's Decision Has Significant And Widespread Consequences For Law Enforcement

A. The Decision Undermines Qualified Immunity By Preventing Its Resolution Before Trial

Because qualified immunity "is an *immunity from suit* rather than a mere defense to liability," this Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Saucier*, 533 U.S. at 200-201 (internal quotation marks omitted). The Ninth Circuit's decision, however, makes such issues almost impossible to resolve before trial. Where an innocent person is arrested, it is virtually inconceivable that the police will have been wholly unaware of *any* circumstances suggesting that they had the wrong individual. Under the Ninth Circuit's decision, those circumstances give rise to a triable issue over whether the officer "knew"—*i.e.*, whether the officer subjectively concluded—that he was arresting an innocent person. Even if the objective information before an officer otherwise establishes probable cause, summary judgment is unavailable whenever the plaintiff alleges that the officer knew he was making a mistake, because "an officer cannot have probable cause to believe the person arrested has committed the crime * * * when he knows the warrant identifies another person." App., *infra*, 9a. Whether the officer "knew or did not know he was causing the arrest of the wrong man" would almost always be "an issue reserved to the trier of fact at trial." *Id.* at 10a. Just like the Ninth Circuit decision this Court summarily

reversed in *Hunter* v. *Bryant*, 502 U.S. at 228, the Ninth Circuit's decision here "routinely places the question of immunity in the hands of the jury." Immunity, however, "ordinarily should be decided by the court long before trial." *Ibid.*

This case demonstrates the dramatic impact of the Ninth Circuit's approach. The court of appeals found no dispute over the evidence before Agent Gregory. The Florida warrant set forth the name used by respondent, as well as his Social Security number, birth date, race, and approximate height. Indeed, respondent *was* the person named in the warrant: Florida authorities simply issued the warrant in respondent's name, with his Social Security number, and birth date, because respondent's brother had assumed respondent's identity while committing crimes in Florida. The evidence, moreover, shows that Agent Gregory *subjectively* believed respondent was named in the Florida warrant. After finding the warrant, Agent Gregory advised the FBI's Philadelphia Office that, "[i]n view of [respondent]'s hang-up phone call *and status as a fugitive himself*, he appears unlikely to provide any information regarding his brother, Robert Lee." C.A. E.R. 76 (emphasis added). All of that, however, is overcome—and Agent Gregory now must endure a trial—because of respondent's claim that Gregory inferred and thus "knew" that Florida authorities had mistakenly issued the warrant for him rather than his brother. The Ninth Circuit effectively imposes a standard of near perfection: Any countervailing fact to which a plaintiff can point in support of "actual knowledge" precludes summary judgment on qualified immunity.

"It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense where * * * a decisionmaker's mental processes are involved." *Harlow*, 457 U.S. at 817 n.29. That is precisely what the Ninth Circuit's decision allows, and "[t]he effect of this development upon the willingness of

individuals to serve their country is obvious." *Ibid.* "If an officer executing an arrest warrant must do so at peril of" litigation any time "there is any discrepancy in the description of the warrant * * * , many a criminal will slip away." *Johnson* v. *Miller*, 680 F.2d at 41. Officers can act decisively "without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated." 468 U.S. at 195. If claims regarding what the officer thought or concluded from the information before him are permitted to defeat probable cause and qualified immunity, the protections of qualified immunity are all but lost.

That result is particularly problematic where, as here, officers act on a warrant they had no role in procuring. If officers executing such a warrant must endure trial and confront potential liability whenever the warrant is in error, officers will be forced to conduct their own investigations before executing facially valid warrants. Worse, officers may simply have to decline to enforce warrants where resources do not permit a duplicate investigation. The Ninth Circuit's rule thus "pits the officer against the decision of the judicial authority issuing the warrant," barring him from complying with the command "to arrest unless he himself can ascertain that an arrest is in order." *Bur* v. *Gilbert*, 415 F. Supp. 335, 340-41 (E.D. Wis. 1976). Law enforcement cannot function if each officer must verify the accuracy of every judicial warrant he is asked to execute.

B. The Issue Is Of Recurring And Increasing Importance In Many Contexts

This issue, moreover, is of recurring and increasing importance. Day after day, officers must make difficult on-the-spot judgments whether the person they encounter is the person named in the warrant. See pp. 19-25, *supra*; *Hill* v. *Scott*, 349 F.3d 1068 (8th Cir. 2003) (arrest of Brian

Arthur Hill on warrant for Brian Walter Hill). Moreover, with identity theft rampant, criminals can pose as others when committing crimes or when apprehended. That creates an ever-increasing risk that officers will be subjected to suit when warrants are issued for, and unwittingly executed against, the victims of identity theft. Precisely that happened here, and the Federal Reporters are replete with similar cases. See, *e.g.*, *Young* v. *City of Little Rock*, 249 F.3d 730, 732 (8th Cir. 2001) (plaintiff arrested under warrant after sister committed crimes while using her identifying information); *Kennell* v. *Gates*, 215 F.3d 825 (8th Cir. 2000) (plaintiff arrested where warrant listed her name as an alias for her sister); *Brady*, 187 F.3d at 106 (warrant issued for plaintiff because brother, when arrested for drunk driving, passed himself off as plaintiff); *Hallock* v. *United States*, 253 F. Supp. 2d 361 (N.D.N.Y. 2003) (claim that warrant was issued because the plaintiff "was the victim of 'identity theft,' whereby his identifying information was used to establish a child pornography web site"); *Baker* v. *McCollan*, 443 U.S. at 137 (plaintiff arrested on warrant as fugitive after his brother, who had posed as plaintiff when arrested, did not appear for trial). With identity theft increasing at exponential rates, this issue is likely to recur with increasing frequency.[5]

At the same time, effective law enforcement increasingly requires officers to rely on warrants they had no role in

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[5] The Federal Trade Commission (FTC) reports that, since it assumed the duty to serve as a clearinghouse for identity theft complaints seven years ago, 18 U.S.C. § 1028, the number of complaints has more than quadrupled—from 31,117 in 1999, to 86,212 in 2001, to 161,896 in 2002, to 215,093 in 2003, and to 246,570 in 2004. FTC, National & State Trends In Fraud & Identity Theft, Jan.-Dec. 2004 at 9 (2005) (avail. http://www.consumer.gov/sentinel/pubs/Top10Fraud2004.pdf); FTC, National & State Trends In Fraud & Identity Theft, Jan.-Dec. 2003 at 9 (2004) (avail. http://www.consumer.gov/sentinel/pubs/Top10Fraud2003.pdf).

procuring. Today more than ever, crime is interstate and international in dimension, necessitating close cooperation among state, local, and federal officers, including mutual execution of search and arrest warrants.[6] Precisely when that need for cooperation is greatest, however, the Ninth Circuit has made it most perilous, exposing officers who do no more than execute a facially valid warrant to trial if there is any discrepancy from which they could conceivably have inferred mistake—and to potentially ruinous liability based on the jury's conclusion about what the officer allegedly thought rather than findings about the information before him.

The Ninth Circuit's decision also portends serious consequences in other contexts. For example, any time a plaintiff is subjected to an unsuccessful search, the plaintiff will be entitled to avoid summary judgment so long as he alleges that the searching officers, based on some allegedly excul-

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[6] Congress in recent years has established new federal offices to promote such cooperation in the national security context. 6 U.S.C. § 361 (establishing "the Office of the Secretary for the Office for State and Local Government Coordination" in the Department of Homeland Security "to oversee and coordinate departmental programs for and relationships with State and local governments"); 6 U.S.C. § 112(c)(3) (charging the Department of Homeland Security with "distributing or, as appropriate, coordinating the distribution of, warnings and information to State and local government personnel, agencies, and authorities and to the public"); Exec. Order No. 13,356, 69 Fed. Reg. 53599 (Sept. 1, 2004) ("giv[ing] the highest priority to * * * the interchange of terrorism information between agencies and appropriate authorities of States and local governments * * *"). Cooperation yields results. During Operation FALCON, more than 800 different federal, state, and local law enforcement agencies cooperated to arrest 10,000 fugitives on outstanding warrants in a brief period of time. CNN, Dragnet Nabs 10,000 Fugitives, April 14, 2005 (avail. http://www.cnn.com/2005/LAW/04/14/fugitive.arrests/index.html); Press Release, Operation FALCON a National Success, Apr. 14, 2005 (avail. http://www.usmarshals.gov/district/va-w/news/chron/2005/041405.htm).

patory item or statement, "knew" they would find no evidence. Likewise, claims of malicious prosecution will routinely have to go to trial. Ordinarily, government officials need not fear those claims because plaintiffs must show that "the prior proceeding was without probable cause." *Heck* v. *Humphrey*, 512 U.S. 477, 485 n.4 (1994). But a defendant acquitted after a criminal trial surely can point to some exculpatory evidence or weakness in the case against him—given acquittal, there presumably will be some—and allege that the defendant "actually knew" he was innocent. Under the court of appeals' reasoning, that will be sufficient to require trial, since an official "cannot have probable cause" to press charges against someone "he knows" to be innocent. App., *infra*, 9a. The Ninth Circuit's decision thus resurrects, under the guise of "knowledge," the subjective "good faith" requirement this Court rejected in *Harlow*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 12, 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIAN C. LEE,
PLAINTIFF-APPELLEE,

v.

JAKE GREGORY, UNITED STATES OF AMERICA,
DEFENDANTS-APPELLANTS,

AND

THE FEDERAL BUREAU OF INVESTIGATION,
DEFENDANT.

No. 02-57132

Argued and Submitted Feb. 6, 2004.
Filed April 7, 2004.

Before: NOONAN, THOMAS, and BEA, Circuit Judges.

BEA, Circuit Judge:

In July 1999, Federal Bureau of Investigation ("FBI") Special Agent Jake Gregory ("Gregory") was assigned to assist with a nationwide search for federal fugitive Robert Q. Lee ("Robert") by finding and interviewing Robert's brother Julian Christopher Lee ("Julian"). When Gregory located Julian in April 2000, Julian angrily declined to speak with him. Gregory then obtained a copy of an outstanding Florida arrest warrant for "Christopher Lee," Julian's middle name and one of Robert's aliases, known as such to

the FBI. Gregory passed the warrant to the San Diego Sheriff's Office, which arrested Julian, and released him on bail four days later. Julian filed this action against Gregory, the FBI, and the United States of America, alleging his arrest gave rise to a *Bivens* cause of action[1] against Gregory, and to several causes of action against the other defendants. Gregory moved for summary judgment, contending that he was entitled to qualified immunity. The district court denied Gregory's motion. We affirm.

I. JURISDICTION AND STANDARD OF REVIEW

Although a denial of summary judgment is not ordinarily appealable, we have jurisdiction over Gregory's interlocutory appeal because the ground for the motion is qualified immunity. *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 942 (9th Cir. 2003). We review the district court's denial of summary judgment de novo. *Id.* at 945. Our review is limited to issues of law. *Id.* at 942.

The district court's determination that the parties' evidence presents genuine issues of material fact is not reviewable on an interlocutory appeal. *Mendocino Environmental Ctr. v. Mendocino County*, 192 F.3d 1283, 1291 (9th Cir. 1999). Thus, we limit our review to the question whether, assuming all conflicts in the evidence are resolved in Julian's favor, Gregory would be entitled to qualified immunity as a matter of law. *Id.*; *see also, Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir. 2001) ("Where disputed facts exist, however, we can determine whether the denial of qualified immunity was appropriate by assuming that the version of the material facts asserted by the non-moving party is correct.").

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[1] *Bivens v. Six Unknown Named Agents of Federal Narcotics Bureau*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) held that an unconstitutional search and seizure in violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages.

II. BACKGROUND

The following facts are taken from the record and the district court's order denying summary judgment. Julian's brother Robert had been a fugitive since 1994. The Gloucester County, New Jersey prosecutor's office sought to prosecute him on state robbery and assault charges, but Robert fled. In 1997, the U.S. District Court for the District of New Jersey issued a warrant for Robert's arrest for unlawful flight to avoid prosecution. In the course of the FBI's search for Robert, the Philadelphia FBI office asked the Sacramento FBI office to assist by locating and interviewing Robert's brother Julian.

The Sacramento office found addresses for Julian in the San Diego area and asked the San Diego FBI office for local assistance. In July 1999, Gregory was assigned to find and interview Julian. Gregory inherited the file from another San Diego agent who had interviewed several of Julian's friends.

When Gregory took over the case, the FBI file contained the following information about Julian: he had a California driver's license; he was six feet three inches tall and weighed 270 pounds; he had several California addresses dating back to 1995; in 1997 he had moved to Alaska to work in the commercial fishing industry; and, he occasionally used his middle name, Christopher. The FBI file contained the following information about Robert: he used multiple names, social security numbers, and birthdays; in a 1992 mugshot he was described as six feet tall and weighing 160 pounds; in a 1994 mugshot he was described as six feet tall and weighing 180 pounds; as of February 1997, prosecutors believed that he was living in Alabama under the name Christopher Lee and using Julian's birthday and social security number. Gregory admitted at deposition that all of this information was contained in the file that he received and reviewed in 1999. The file also contained information about an outstanding arrest warrant for aggravated battery

and burglary with assault or battery from Dade County, Florida, issued for Christopher Lee.

In April 2000, continuing his efforts to locate Julian, Gregory interviewed J.B., a friend of Julian. During the interview, Gregory showed J.B. a photograph of Robert. J.B. stated that Julian was not the man in the photograph. On April 21, 2000, Gregory went to Julian's house and left his business card. Julian called Gregory that afternoon and asked whether the law required him to speak with Gregory. Gregory replied that it did not, whereupon Julian angrily told Gregory to stop harassing him, cursed at Gregory, and hung up the phone.

Gregory immediately called the Dade County Sheriff's Department and asked them to fax him a copy of the warrant for Christopher Lee. The warrant, which was issued on December 4, 1998, sought "Christopher Lee" on battery and burglary charges. It described Christopher Lee as a black male, six feet one inch tall and 200 pounds and gave a Florida address and driver's license number. The date of birth and social security number on the warrant were the same as Julian's.

On April 21, 2000, Gregory passed the warrant to the duty sergeant at the San Diego Sheriff's Office ("SDSO") and asked whether the SDSO would be interested in executing the warrant. He told the SDSO that he had located the man named in the warrant. Gregory noticed the discrepancy between the physical description in the warrant (six feet one inch, 200 pounds) and Julian's California DMV record (six feet three inches, 270 pounds). The parties dispute whether Gregory informed the SDSO of the discrepancy; Gregory admitted that he could not recall ever seeing a discrepancy between a warrant's description and actual appearance greater than thirty to forty pounds. The parties also dispute whether Gregory told the SDSO that Robert had appropriated Julian's identity (middle name,

social security number, and birthday); both arresting officers testified that Gregory did not.

On May 4, 2000, the SDSO arrested Julian. One of the arresting officers telephoned Gregory to let him know of Julian's arrest. Gregory went to the SDSO to interview Julian. During the interview, Julian told Gregory that he had never been to Florida, he was not the man named in the warrant, and he had not spoken to his brother in years. Gregory told Julian that if he cooperated by providing information about Robert it might help with his Florida case. At the conclusion of the interview, Gregory told Julian to have a nice trip to Florida.

The SDSO held Julian for four days before he posted bail. During that time, Florida authorities began extradition proceedings, and Julian was charged under a California statute with being a fugitive. About two weeks after Julian's release, his lawyer telephoned Gregory. The lawyer told Gregory that he believed the warrant did not apply to Julian. Gregory contacted officials in Florida and sent them information about and photographs of Robert. The Florida officials compared Robert's mugshot with the Florida driver's license photo of "Christopher Lee." The photos matched and the Florida officials informed Gregory that the warrant was for Robert Lee using the alias "Christopher Lee" and therefore not for Julian. When Gregory relayed this to the San Diego District Attorney's office, all charges against Julian were dropped.

In April 2001, Julian filed his civil action against Gregory, the FBI, and the United States. After the district court granted in part and denied in part defendants' motion to dismiss, Julian's surviving complaint alleged one *Bivens* cause of action against Gregory and several other causes of action against the other defendants. Julian's complaint alleges that Gregory violated his Fourth Amendment rights by arresting him without probable cause. He alleges that Gregory knew that Julian was not the man sought by the

Florida warrant, but arrested him anyway in order to obtain information about Robert.

Gregory moved for summary judgment on qualified immunity grounds. He argued that he did not violate Julian's constitutional rights because he had probable cause to arrest Julian, and that no clearly established law prohibited him from executing a facially valid warrant. The district court found that there were disputed issues of material fact as to what information Gregory gave to the SDSO and, more importantly, as to whether Gregory actually knew that the warrant did not apply to Julian. The district court denied Gregory's motion for summary judgment. Gregory filed a timely notice of appeal.[2]

III. DISCUSSION

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). The qualified immunity inquiry involves two sequential questions. First: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Second: "if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step, is to ask whether the right was clearly established . . . in light of the specific context of the case." *Id.*

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[2] The district court's order also denied the United States's motion for summary judgment on several causes of action and granted the motion to strike the portion of the complaint seeking punitive damages from the United States. These rulings were not appealed, and are not presently before this court.

A. Taken In the Light Most Favorable To Plaintiff, The Disputed Facts Show a Constitutional Violation

Gregory first contends that he did not violate Julian's constitutional rights at all because he had probable cause to believe that the person named in the facially valid Florida warrant was in fact Julian and his motive in arresting Julian to pressure him for information about Robert is therefore irrelevant to the Fourth Amendment analysis.

Gregory is correct that allegations of ulterior motives cannot invalidate police conduct that is justified by probable cause. *Whren v. United States*, 517 U.S. 806, 811-15, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Thus, if his motive in causing Julian's arrest was to squeeze Julian for information about Robert, *Whren* does render such motive irrelevant. However, Gregory's contention ignores the fact that his conduct must be " 'objectively reasonable' *in light of the facts and circumstances confronting [him]*, without regard to [his] underlying intent or motivation." *Graham v. Connor*, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (emphasis added). Gregory's actions are not impugned because of his motive, but because of his claimed *knowledge* that Julian was not the person named in the Florida arrest warrant.

Julian contends that in light of the facts and circumstances confronting Gregory, Gregory actually knew that the Florida warrant applied not to him, but to Robert. The district court found the evidence presented a genuine issue of material fact as to whether Gregory actually knew that the warrant did not apply to Julian. We may not review that determination. *Mendocino Envtl. Ctr.*, 192 F.3d at 1291. Gregory's contention that his actual knowledge should be ignored is completely without merit.[3]

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[3] Gregory's contention that he did not cause Julian to be arrested because he merely passed the warrant to the SDSO is similarly without merit. Gregory told the SDSO that he had located the

Knowingly arresting the wrong man pursuant to a facially valid warrant issued for someone else violates rights guaranteed by the Fourth Amendment. *See Brown v. Byer*, 870 F.2d 975 (5th Cir. 1989) ("The existence of a facially valid warrant for the arrest of one person does not authorize a police officer to effect the arrest of another person. . . ."). Thus, Julian has presented facts which, if accepted by a reasonable trier of fact, would show that Gregory violated his constitutional right to be free from an unreasonable seizure. The district court did not err in finding that the disputed facts, taken in the light most favorable to Julian, show a constitutional violation.

B. Clearly Established Law Gives Reasonable Officers Notice That Knowingly Arresting the Wrong Person Violates the Rights Guaranteed by the Fourth Amendment

Gregory contends that even if there is an issue of fact as to whether he violated Julian's Fourth Amendment rights, there is no clearly established law that would have provided him with notice that his actions were unlawful. To determine whether a right was "clearly established" we ask "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151.

Some wrongs are self-evident. "[E]ven if there is no closely analogous case law, a right can be clearly established on the basis of 'common sense.'" *Giebel v. Sylvester*, 244 F.3d 1182, 1189 (9th Cir. 2001) (citation and internal quotation marks omitted). There is no requirement that courts have previously ruled "the very action in question" unlawful. *Anderson v. Creighton*, 483 U.S. 635, 640, 107

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individual named in the warrant and passed on Julian's address. A police officer is "responsible for the natural consequences of his actions." *Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

S.Ct. 3034, 97 L.Ed.2d 523 (1987). No reasonable officer would believe that he is entitled knowingly to arrest the wrong man pursuant to a facially valid warrant the officer knows was issued for someone else. Every officer knows, or should know, that he needs a warrant which correctly identifies the arrestee, or probable cause, to arrest a particular individual.

This court, sitting en banc after *Saucier*, has found a clearly established right against being criminally charged based on deliberately fabricated false evidence even though there were no prior cases expressly recognizing the specific right—"[p]erhaps because the proposition is virtually self-evident." *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001) (en banc). Similarly, this court has stated "no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control." *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994). Knowingly arresting the wrong person is the same kind of self-evident wrong because an officer cannot have probable cause to believe the person arrested has committed the crime described in a warrant when he knows that the warrant identifies another person.

Even were it not self-evident, knowingly causing the arrest of the wrong person is plainly unlawful in light of past precedent. *See Mendocino Envtl. Ctr.*, 192 F.3d at 1292-95 (where district court found a factual dispute over the source and veracity of statements on which officers allegedly relied for probable cause to arrest plaintiffs, officers were not entitled to qualified immunity). Although the facts in *Mendocino Environmental Center* are different from the facts in issue here, "[a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Mendoza*, 27 F.3d at 1362.

IV. CONCLUSION

Of course, we do not determine whether Gregory knew or did not know he was causing the arrest of the wrong man when he turned the SDSO on to Julian. That is an issue reserved to the trier of fact at trial, if a trial takes place. We merely hold that the district court did not err in finding that the disputed facts, viewed in the light most favorable to Julian, create a triable issue of fact: whether Gregory knew he was causing the arrest of the wrong man. If established, such wrongful arrest would be sufficient to constitute a constitutional violation. We further hold that clearly established law provides notice to a reasonable officer that arresting a man pursuant to a facially valid warrant that the officer knows does not apply to the man arrested is unlawful. The district court correctly denied Gregory's motion for summary judgment made on qualified immunity grounds. The order of the district court is AFFIRMED.

APPENDIX B

TITLE OF APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JULIAN C. LEE, AN INDIVIDUAL,
PLAINTIFF,

VS.

JAKE GREGORY, UNITED STATES OF AMERICA,
AND DOES 1 THROUGH 10, INCLUSIVE,
DEFENDANTS,

CASE NO. 01CV0739-K (RBB)

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(1) ORDER DENYING DEFENDANT GREGORY'S MOTION FOR SUMMARY JUDGMENT

(2) ORDER DENYING DEFENDANT UNITED STATES' MOTION FOR SUMMARY JUDGMENT

(3) ORDER GRANTING DEFENDANT UNITED STATES' MOTION TO STRIKE

Filed October 11, 2002.

The Court considers Defendant Jake Gregory's motion for summary judgment and Defendant United State[s] of America's motion for summary judgment and motion to strike, both filed on September 9, 2002. Plaintiff opposes both motions for summary judgment. The motion to strike

is unopposed. The Court has federal question and supplemental jurisdiction.

On July 3, 2001, Plaintiff filed his First Amended Complaint ("FAC") asserting eleven causes of action against both Jake Gregory ("Agent Gregory") and the United State[s] of America ("Defendant"). On September 7, 2001, both Defendants filed a motion to dismiss, or in the alternative, for summary judgment. On October 3, 2001, this Court denied Defendants' motion for summary judgment and granted in part and denied in part the motion to dismiss (this Court dismissed three causes of action, allowing eight remaining causes of action to stand).

As the FAC currently stands, it alleges one cause of action against Agent Gregory, and seven causes of action against Defendant United States of America. The sole cause of action against Agent Gregory is a *Bivens* action. The seven causes of action against the Defendant United States of America are as follows: (1) False Arrest and Imprisonment; (2) Malicious Prosecution; (3) Abuse of Process; (4) Battery; (5) Intentional Infliction of Emotional Distress; (6) Negligence; and (7) Negligent Infliction of Emotional Distress.

Agent Gregory moves for summary judgment in the sole cause of action against him. Defendant United States of America moves for summary judgment on all causes of action, as well as a motion to strike reference to punitive damages. The Court will look at each motion in turn.

I. Background

The following is taken from the parties' pleadings and is not to be construed as findings of fact by the Court.

A. Plaintiff's Complaint

In his FAC, Plaintiff alleges the following facts: Plaintiff was born on March 7, 1967. Plaintiff has a military background and no criminal history or record. Plaintiff has a brother named Robert Lee, a fugitive wanted on robbery

and assault charges in New Jersey dating from 1994. Robert Lee is estranged from his family and has not had any contact with any of them for a number of years. Robert has adopted many aliases over the past few years, including using the name and social security number of his brother, Plaintiff Julian Christopher Lee. Plaintiff alleges that the FBI was aware of this and routinely checked with Plaintiff's parents to determine whether Robert had been in contact with them.

According to the complaint, in late 1998, Defendant Jake Gregory, an FBI agent, contacted Plaintiff's old roommate Grace Kessler and ex-girlfriend Jana Dubraveak. Gregory allegedly told them that his inquiry concerned Plaintiff's brother Robert, not Plaintiff. They both told Gregory that they did not know how to contact Plaintiff.

In April of 2000, Gregory contacted another old roommate of Plaintiff's, J.B., and asked him to come to Gregory's Carlsbad office to answer some questions. At the office, Gregory showed J.B. a photo of Robert Lee, and J.B. told Agent Gregory that he had never seen Robert Lee before. On April 28, 2000, Agent Gregory came to Plaintiff's house in Encinitas, California while Plaintiff was at work. Gregory spoke to Plaintiff's girlfriend's brother, Brian Ingraham. Gregory told Ingraham that his inquiry involved Plaintiff's brother, not Plaintiff, and left his business card and a note for Plaintiff to contact him.

Upon receiving the note, Plaintiff called Gregory back the same day. Plaintiff claims that he told Gregory that he had no idea where his brother was and that he had not spoken to him in a number of years. Plaintiff also demanded that Gregory stop following him and harassing his friends and acquaintances as neither he nor they knew the location of Robert Lee. Plaintiff then hung up the phone.

The following week, on May 4, 2000, a San Diego County Sheriff's Deputy was in Plaintiff's neighborhood ques-

tioning his neighbor about Plaintiff and his brother Robert. Later on the same day, Plaintiff's girlfriend, Sarah, saw a sheriff's car parked on the street and spoke with the deputy in the car, Marco Garmo. Deputy Garmo informed her that he was working for the FBI on the case involving Robert Lee and that there was an outstanding warrant for his arrest from Florida. Sarah explained to Deputy Garmo that the FBI had been looking for Robert Lee for years and that all she knew about Robert was that he was estranged from the Lee family. Plaintiff's girlfriend called him immediately and Plaintiff then called Deputy Garmo on Garmo's celiular phone, and explained to him that he had not spoken to his brother in years and did not know where he was.

Later that night, Plaintiff went to the supermarket. As he pulled into the parking lot, he was surround by several sheriff's cars and was ordered out of his car at gunpoint by the sheriffs, including Sheriff's Deputy Garmo. The officers told Plaintiff that he was being arrested on the Florida warrant. The Florida warrant had been issued in Plaintiff's name and social security number ("SSN"), though some of the physical characteristics did not match (e.g. there was a significant difference between the weight of the person wanted in Florida [200 lbs.] and Plaintiff's weight [270 lbs.]). The officers handcuffed Plaintiff, place him under arrest, and took him to the Encinitas Sheriff's Station.

Upon Plaintiff's arrival at the station, still handcuffed, he was placed in a room with FBI Agent Gregory. Plaintiff alleges that Gregory demanded that Plaintiff give him information on his brother, and that he said he would be able to clear up the "Florida situation" if Plaintiff gave him information on his brother. Plaintiff claims that he told Agent Gregory that he did not know where his brother was and that he had not heard from him or spoken to him in years, after which Agent Gregory allegedly replied "Have a nice trip to Florida" and walked out of the room.

Plaintiff remained in jail four days until he was able to post bail on May 8, 2000. Also on May 8, 2000, extradition papers were filed to begin Plaintiff's extradition to Dade County, Florida. On May 9, 2000, Plaintiff was formally charged under the California Penal Code § 1551.1 with being a fugitive from justice. Shortly thereafter, Plaintiff's friends were able to hire an attorney who contacted the San Diego District Attorney's Office to inform them of Plaintiff's identity and his brother's history. Shortly after these events, Plaintiff was freed and his extradition case was dismissed by the San Diego District Attorney.

B. Defendants' Story

In support of their motion for summary judgment, Defendants submit a sworn affidavit by Agent Gregory, selected FBI "Bulletins," a copy of the Florida warrant, and a letter from the Gloucester County, New Jersey Prosecutor's Office. The following are the facts related by the Defendants: the FBI became involved in investigating the unlawful flight of Robert Lee, Plaintiff's brother, based on robbery and aggravated assault charges dating back to 1994. On or about August 13, 1998, the San Diego FBI received a request to locate and interview the fugitive's brother, Julian Christopher Lee in order to inquire about Robert Lee's whereabouts. An agent spoke to Plaintiff's ex-girlfriend and roommate, neither of whom knew how to contact Plaintiff.

In July of 1999, the San Diego FBI received a second request to follow up on leads on the whereabouts of Robert Lee. The request listed the names and social security numbers of Keith Lee, Willmar Lee, Plaintiff (as "Christopher Lee") and Robert McMullen as possible aliases for Robert Lee (the other aliases were Robert Lee's older brothers' and his cousin's identities). The request listed two addresses for Christopher Lee, one in Miami, Florida and the other in Encinitas, California. The request also stated that "Christopher Lee" was wanted on a Florida warrant

for assault, and that the social security number listed on that individual was the same as that of the Christopher Lee living in Encinitas, California. The request also contained an attachment from the New Jersey prosecutor's office that stated that as of 1997, Robert Lee was known to be using the name "Christopher Lee."

Agent Gregory was assigned to check on the "lead." Gregory went to Plaintiff's house in Encinitas, determined that Plaintiff was not home, and left a card with an individual with the message that Agent Gregory wished to speak to Plaintiff about his brother. Defendants claim that Plaintiff telephoned Agent Gregory, indicated that he did not wish to speak to the FBI, accused the FBI of harassing his friends and hung up.

Defendants claim that Agent Gregory was aware that there was an arrest warrant from Miami for "Christopher Lee" with the same date of birth and SSN as the individual that Gregory had been speaking to in Encinitas. Defendants claim that after Plaintiff refused to speak to Agent Gregory, Gregory believed it was possible that Plaintiff was uncooperative because he knew of the Miami warrant, or possibly that Plaintiff was actually the fugitive Robert Lee. Agent Gregory called the police in Miami and determined that the arrest warrant was for Christopher Lee, that it was current, and that the Miami police were willing to extradite Christopher Lee from anywhere. As California law does not allow federal agents to execute non-federal warrants, Agent Gregory passed on the information about the Miami warrant to the San Diego County Sheriff's Office ("SDSO"), and indicated to his directing office in Sacramento that is was his intention to forego any further investigation as it appeared unlikely that Plaintiff would provide any information about his brother.

However, on May 4, 2000, after the San Diego Sheriffs had arrested Plaintiff and brought him in to the station, Agent Gregory went to the Encinitas Station to determine

whether Plaintiff had any information about his brother. Plaintiff denied any form of contact with his brother for several years. Defendants claim that Agent Gregory informed Plaintiff that if he assisted in locating his brother Robert, it might help Plaintiff's "Florida situation," but they deny that any promises were made.

II. Discussion

Agent Gregory moves for summary judgment in the only cause of action against him, the *Bivens* action. Defendant United States of America moves for summary judgment on all causes of action, as well as a motion to strike reference to punitive damages. The Court will look at each motion in turn.

A. Legal Standard for Summary Judgment, Fed.R.Civ.P. 56(c)

Federal Rules of Civil Procedure 56(c) provides that summary judgment is appropriate if there is no genuine issue as to any material facts, and the moving party is entitled to a judgment as a matter of law. Where the plaintiff bears the burden of proof at trial, summary judgment for the defendant is appropriate if the defendant shows that there is an absence of evidence to support the plaintiff's claims. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998). The movant has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). The burden then shifts to the nonmovant to show that summary judgment is not appropriate. *Celotex*, 477 U.S. at 324. To make such a showing, the nonmovant must go beyond the pleadings to designate specific facts showing that there is a genuine issue for trial. *Id.* However, in considering this motion, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his or her favor. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986).

Determinations regarding credibility, the weighing of evidence, and the drawing of legitimate inferences are jury functions, and not appropriate for resolution by the court in a motion for summary judgment. *Id.* at 255.

B. Agent Gregory's Motion for Summary Judgment

Plaintiff's *Bivens* cause of action alleges that Agent Gregory deprived Plaintiff of his First, Fourth, Fifth and Eight[h] Amendment right when Agent Gregory caused his arrest knowing Plaintiff was not the person sought in the Florida arrest warrant. Agent Gregory seeks summary judgment because he argues he is entitled to qualified immunity.

In support of his argument, Agent Gregory cites *Saucier v. Katz*, 533, U.S. 194 (2001) to highlight the two-part test mandated for *Bivens* claims. Motion at 10. According to Agent Gregory, the first part of the inquiry is whether "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 200. The second inquiry is "whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." *Saucier*, 533 U.S. at 201. Agent Gregory provides three arguments supporting his motion for summary judgment. The Court will analyze each argument in turn.

1. Agent Gregory did not violate Plaintiff's constitutional rights

First, Agent Gregory argues that he did not violate Plaintiff's constitutional rights because: (i) he did not arrest Plaintiff or take him into custody; and (ii) he had a facially valid arrest warrant which Agent Gregory believed pertained to Plaintiff, not Plaintiff's brother.

a. Agent Gregory did not arrest Plaintiff nor take him into custody

Agent Gregory argues that because he did not arrest Plaintiff, no constitutional right is implicated. Motion at 11.

The Court does not agree. Plaintiff attacks this argument by stating that there is no case law which states that Agent Gregory must have personally arrested Plaintiff for *Bivens* liability to attach. Plaintiff argues that Agent Gregory procured his arrest when: (i) Agent Gregory called Florida to obtain a copy of the arrest warrant; and (ii) Agent Gregory called the SDSO and requested they help him serve the warrant. Opposition at 7. Furthermore, Plaintiff cites to *Malley v. Briggs*, 475 U.S. 335 (1986) and *Fletcher v. Kalina*, 93 F.3d 653 (9th Cir. 1996) which hold that liability can attach when the officer procures the arrest but is not the arresting officer. Although Agent Gregory attempts to distinguish these cases in his reply, Agent Gregory does not provide any case law which holds that an officer must personally arrest a person for *Bivens* liability to attach.

In his reply, Agent Gregory argues that he did not cause Plaintiff's arrest, "to the contrary, Plaintiff's arrest occurred because of a chain of events over which Agent Gregory had no control." Reply at 7. Agent Gregory contends that Florida issued the warrant, and the SDSO executed it. This argument is unpersuasive because even Defendant admits that the SDSO did not obtain the warrant from Florida, it was provided by Agent Gregory. Motion at 6.

b. Florida arrest warrant was facially valid

Agent Gregory argues that with the information he had, he reasonably believed that the person named in the Florida arrest warrant was the Plaintiff. Agent Gregory contends that the information in the warrant matched the Plaintiff's name, gender, race, date of birth and social security number. Agent Gregory avers that the discrepancy in the physical description (height and weight) was not significant. Furthermore, Agent Gregory argues that since he did not order the SDSO to arrest Plaintiff, his conduct did not violate Plaintiff's Fourth Amendment rights.

Plaintiff, on the other hand, argues that this is the central factual dispute: whether Agent Gregory believed Plaintiff to be the warrant suspect[,] or whether Agent Gregory knew the warrant pertained to Plaintiff's brother and procured the arrest to obtain information on Plaintiff's brother. Plaintiff provides evidence which demonstrates that Agent Gregory was aware that: (i) Plaintiff's brother used Plaintiff's name, date of birth and social security number; (ii) Plaintiff's brother had assumed Plaintiff's identity previously; and (iii) the warrant was for a man described as 6 feet tall and weighed 200 pounds, whereas Plaintiff is 6 feet 3 inches tall and weighs 270 pounds. Opposition at 14. Plaintiff further provides evidence that Agent Gregory never informed the SDSO of the physical discrepancy, nor that Plaintiff's brother had used Plaintiff's information as an alias. Opposition at 15. Refuting that the discrepancy in physical description was not significant, Plaintiff provides evidence that Agent Gregory himself had never seen a discrepancy of more than 30-40 pounds in two or more official documents. Opposition at 7.

Agent Gregory replies that Plaintiff's theory is fundamentally flawed. Agent Gregory argues that: (i) he only had two personal contacts with Plaintiff (the brief telephone call and the interview post arrest); (ii) he had no information associating Plaintiff's brother with Florida; and (iii) he disclosed the discrepancy to the SDSO. Whether or not the physical discrepancy was significant, and whether or not Agent Gregory told the SDSO of the discrepancy is in dispute. Hence there is a material issue of fact that the precludes summary judgment for this reason.

2. Plaintiff fails to state a cognizable constitutional violation because his arrest was made pursuant to a valid arrest warrant.

Second, Agent Gregory argues there was no constitutional violation because the facially valid arrest warrant established probable cause, and therefore there was no

Fourth Amendment violation. In support of his position, Agent Gregory cites to *Baker v. McCollan*, 443 U.S. 137 (1979), which held that the execution of a facially valid arrest warrant does not give rise to a constitutional violation even if the person named in the warrant is not the person whom the authorities intended to arrest.

Plaintiff argues that the holding in *Baker* is distinguishable from the present facts because the issue is *Baker* was whether "simple negligence" states a claim for relief under 42 U.S.C. § 1983. *Id.* at 139. Plaintiff avers that this is not a case of simple negligence; rather, the claim is that Agent Gregory procured Plaintiff's arrest knowing that he was not the man named in the Florida warrant in order to gather information on Plaintiff's brother. Plaintiff cites to *Brown v. Byer*, 870 F.2d 975, 979 (5th Cir. 1989) which held that knowingly arresting the wrong person under a facially valid warrant does constitute a constitutional violation. Agent Gregory replies by arguing that Plaintiff has failed to make a substantial showing that Agent Gregory "knew" Plaintiff was not the man named in the warrant, and that Agent Gregory has testified at deposition to this effect. Whether Agent Gregory knew plaintiff was the person in the Florida warrant is an issue for the finder of fact, making summary judgment inappropriate.

3. No clearly established law would have provided notice that Agent Gregory's actions were clearly unlawful

Last, Agent Gregory argues there was no clearly established law that: (i) prohibited Agent Gregory from passing a valid arrest warrant to the SDSO; and (ii) required him to investigate further. Yet Plaintiff argues that there is clearly established law that knowingly arresting the wrong person does constitute a constitutional violation. As Plaintiff points out, this Court has already determined in the Order denying Agent Gregory's motion to dismiss, that if proven, Agent Gregory's conduct would

constitute a violation of Plaintiff's Fourth Amendment rights.

Agent Gregory replies by arguing that under an objective view of the facts, a reasonable officer could have concluded that the arrest applied to Plaintiff, and thus it was not unlawful to pass the warrant to the SDSO. Reply at 9. Yet, Agent Gregory has not addressed the law relating to knowingly arresting the wrong person. Because this is an issue of material fact, summary judgment is inapplicable.

4. Summary

Agent Gregory states that the pleadings "reveal no genuine dispute but, rather, the parties have each argued differing interpretations of those facts." Reply at 3. The Court does not agree. From the evidence provided by Agent Gregory and Plaintiff, the following facts are clear: (i) Agent Gregory was assigned to follow the "lead" to interview Plaintiff in July of 1999; (ii) Agent Gregory had documentation stating that the fugitive had assumed the identify of Plaintiff, including date of birth and social security number; (iii) the Florida arrest warrant described the fugitive as 6 feet tall and 200 pounds; (iv) Plaintiff was described as 6 feet 3 inches tall, and 270 pounds; (v) Agent Gregory called Florida requesting the outstanding arrest warrant; (vi) Agent Gregory called the SDSO and informed them of the existence of the Florida arrest warrant; and (viii) Agent Gregory appeared 15-20 minutes after Plaintiff was arrested.

There appears to be a genuine issue of material fact regarding: (i) whether Agent Gregory informed the SDSO of the physical discrepancy; (ii) whether Agent Gregory informed the SDSO that Plaintiff's brother used Plaintiff's information as an alias; and (iii) whether a discrepancy of over 30 pounds was significant. In essence, Agent Gregory argues he reasonably, although mistakenly, believed that

the person named in Florida arrest warrant was Plaintiff. Plaintiff argues that Defendant knew the person named in the warrant was not Plaintiff, but that Agent Gregory procured Plaintiff's arrest for the purpose of pressuring Plaintiff to provide information on his brother. This is a factual dispute that is to be determined by a finder of fact, and not appropriate for summary judgment. Therefore, the Court **DENIES** Agent Gregory's motion for summary judgment.

C. Defendant United States of America Motion for Summary Judgment

Plaintiff's remaining causes of action against Defendant are: (1) False Arrest and Imprisonment; (2) Malicious Prosecution; (3) Abuse of Process; (4) Battery; (5) Intentional Infliction of Emotional Distress; (6) Negligence; and (7) Negligent Infliction of Emotional Distress. Defendant moves for summary judgment on all seven causes of action will be analyzed separately.

1. False Arrest and Imprisonment

Defendant argues that because the SDSO, and not Agent Gregory, arrested Plaintiff, there was no federal employee involved and therefore the claim is meritless. Citing *Arnsberg v. United States*, 757 F.2d 971 (9th Cir. 1984), Defendant contends that an arrest pursuant to valid warrant protects the officer and, consequently, the United States from liability for damages on a theory of false arrest or imprisonment. *Arnsberg*, however, is clearly distinguishable from the present facts, because the *Arnsberg* court specifically noted that the agents "acted nearly perfectly." *Id.* at 980. In this case, Plaintiff argues that Agent Gregory acted with malice, as defined in *Ting v. United States*, 927 F.2d 1504 (9th Cir. 1991) (malice refers not "to the actual physical execution of the warrant, but to the officer's state of mind in procuring or executing the warrant.") Defendant replies by arguing that the record does not support a

genuine issue of fact. The Court does not agree. Plaintiff has provided evidence that would lead to a reasonable inference that Agent Gregory knew Plaintiff was not the subject of the Florida arrest warrant, but nonetheless procured his arrest for the purpose of obtaining information on Plaintiff's brother. Therefore, there is a dispute as to material facts relating to whether Agent Gregory knowingly arrested the wrong person or not. The Court **DENIES** Defendant's motion for summary judgment on this cause of action.

2. Malicious Prosecution

Defendant states that the standard for malicious prosecution is the procurement of arrest under lawful process but for malicious motive and without probable cause. Defendant cites to *Asargi v. City of Los Angeles*, 15 Cal.4th 744, 757 (1997) in support of this standard. Defendant contends that because Agent Gregory believed that Plaintiff was the person named in the Florida arrest warrant, it was objectively reasonable for Agent Gregory to believe that probable cause existed for the arrest, and the arrest was therefore not malicious. Plaintiff avers that the only dispute is whether Agent Gregory acted with the reasonable belief that Plaintiff was the person wanted in the arrest warrant. Citing the same evidence, Plaintiff argues that there is a genuine issue of fact on this issue. The Court agrees, and there **DENIES** Defendant's motion for summary judgment on this claim.

3. Abuse of Process

Abuse of process is the misuse or misapplication of a process justified in itself for an end other than that which it was designed to accomplish. *Lunsford v. Am. Guar. & Liab. Ins., Co.*, 18 F.3d 653, 655 (9th Cir. 1994). Defendant concedes that there is no distinction between abuse of power and malicious prosecution, and sets forth the same argument as the malicious prosecution section. Plaintiff

likewise sets forth the same facts. Having found a genuine issue of fact regarding Agent Gregory's belief, the Court **DENIES** Defendant's motion for summary judgment on this issue.

4. Battery

Defendant contends that battery is the "unlawful, harmful or offensive contact with the person of another," *citing In re Baldwin*, 249 F.3d 912, 918 (9th Cir. 2001). Defendant argues that because Agent Gregory never physically contacted Plaintiff, this claim cannot stand. Plaintiff, on the other hand, states that battery is "the intent to cause imminent apprehension of harmful physical contact with the harmful physical contact resulting therefrom," *citing Rains v. Superior Court*, 150 Cal.App.3d 933, 938 (1984). Plaintiff concedes that Agent Gregory did not personally touch Plaintiff, but alleges that by procuring the arrest, Agent Gregory caused the unlawful contact, i.e. the unlawful arrest, between the SDSO deputies and Plaintiff. Because there is a material issue as to whether Plaintiff was unlawfully arrested, the Court **DENIED** Defendant's motion of summary judgment on this cause of action.

5. Intentional Infliction of Emotional Distress

Defendant asserts the elements of the tort of intentional infliction of emotional distress: (1) extreme and outrageous conduct by the defendant; (2) intention to cause, or reckless disregard of the probability of causing, emotional distress; (3) severe emotional suffering; and (4) actual and proximate causal link between the tortious conduct and the emotional distress. In support of this proposition, Defendant relies on *Molko v. Holy Spirit Assoc. for the Unification of World Christianity*, 46 Cal.3d 1092 (1988). Defendant argues that Plaintiff has failed to demonstrate that Agent Gregory's conduct was so outrageous as to exceed all bounds of decency. Relying on this Court's previous order, Plaintiff states that a false arrest can serve as a basis for a claim of

intentional infliction of emotional distress. Next, Plaintiff argues that he raises a triable issue of outrageous conduct, specifically, if Agent Gregory knowingly had Plaintiff arrested on a warrant he knew was for Robert with the purpose of acquiring information about Plaintiff's brother. The evidence Plaintiff points to is what Agent Gregory told the SDSO, and for what purpose. Plaintiff argues Agent Gregory did not tell the SDSO about Robert because he wanted to keep the SDSO in the dark. Opposition at 17. Agent Gregory claims to have told SDSO about Robert. This is an issue of credibility between Agent Gregory and the SDSO deputies. As such, there is a genuine issue of fact which should be decided by the finder of fact, and hence this claim is not appropriate for a motion for summary judgment. Therefore, the Court **DENIES** Defendant's motion for summary judgment on this claim.

6. Negligence and Negligent Infliction of Emotional Distress.

Plaintiff alleges that Defendant had a duty to Plaintiff to act with ordinary care and prudence so as not to harm or injure another. As a result of Defendant's negligent conduct, Plaintiff contends he suffered emotional distress. Defendant argues that there is no such duty to detect Plaintiff's innocence prior to turning the Florida arrest warrant over to the SDSO. Defendant further argues that a duty arise only when there is a special relationship, which occurs when a citizen relies to his detriment on the officer's conduct. Defendant therefore concludes there was no special relationship between Agent Gregory and Plaintiff, and as such, Plaintiff has not stated a claim for negligence or negligent infliction of emotional distress.

Plaintiff rejects this position, and argues that Gregory had a duty to "use reasonable prudence and diligence to determine whether a party being arrested is the one described in the warrant. The officer may not refuse to act upon information offered him which discloses the warrant is

being served on the wrong person." Plaintiff supports this contention by citing *Lopez v. City of Oxnard*, 107 Cal.App.3d 1, 7 (1989). Additionally, Plaintiff states that this duty was created by California Civil Code section 43.55, which requires all peace officers to act "without malice and in the reasonable belief that the person arrested is the one referred to in the warrant." Defendant counters this by arguing that since Agent Gregory never arrested Plaintiff, reliance on California Civil Code section 43.55 is misplaced. The Court does not agree. Defendant relies on *Guccione v. United States*, 847 F.2d 1031, 1037 (2d Cir. 1988), which holds that the FBI owes no general duty in conduct of undercover operations, absent custody or other affirmative undertaking on which plaintiff justifiably relies. This case is distinguishable because *Guccione* was decided in the context of 28 U.S.C. § 2680(h), known as the intentional tort exception, where Guccione was the subject of an undercover investigation. The court held that the agents did not have an affirmative duty to protect Guccione apart from its duty to supervise its employees. But the court clearly stated that "all citizens, of course, have the right to expect that the Government's agents will not cause deliberate harm to innocent persons." *Id.*, 847 F.2d at 1037. The Court find that Agent Gregory did owe Plaintiff a duty to not cause deliberate harm to an innocent person, and whether Gregory breached that duty is a question for the finder of fact. As such, the Court **DENIES** Defendant's motion for summary judgment on these causes of action.

D. Defendant's Motion to Strike

Defendant moves the court to strike from Plaintiff's complaint all demands for punitive damages. Defendant argues that the United States is not liable for punitive damages in Federal Tort Claim Act ("FTCA") claims. Motion at 14-15. Plaintiff does not address this motion, therefore the Court assumes this motion is unopposed.

1. Legal Standard

Federal Rule of Civil Procedure 12(f) provides that "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A party may move to strike any part of the prayer for relief "when the damages sought are not recoverable as a matter of law." *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1479 n.34 (C.D. Cal. 1996) (citing *Tapely v. Lockwood Green Engineers, Inc.*, 502 F.2d 559, 560 (8th Cir. 1974) (per curiam)).

2. Discussion

Defendant correctly states that under the FTCA, the United States "shall not be liable . . . for punitive damages." 28 U.S.C. § 2674. This was confirmed in *Nurse v. United States*, 226 F.3d 996, 1005 (9th Cir. 2000). Because the damages sought are not recoverable as a matter of law, the Court **GRANTS** Defendant's motion to strike.

III. Conclusion

For the foregoing reasons, Agent Gregory's motion for summary judgment is **DENIED**; Defendant United States of America's motion for summary judgment is **DENIED**; Defendant United States of America's motion to strike is **GRANTED**.

IT IS SO ORDERED.

10/11/02
Date

/s/ Judith N. Keep
Judge Judith N. Keep
United States District Court
Southern District of California

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JULIAN C. LEE, AN INDIVIDUAL,
PLAINTIFF,

VS.

JAKE GREGORY, UNITED STATES OF AMERICA,
AND DOES 1 THROUGH 10, INCLUSIVE,
DEFENDANT,

CASE NO. 01CV0739K RBB

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Filed October 3, 2001.

On August 8, 2001, Defendants, proceeding through counsel, filed a motion to dismiss Plaintiff's complaint, or in the alternative, for summary judgment. On September 7, 2001, Plaintiff, proceeding through counsel, filed an opposition.

I. Background

A. Plaintiff's Complaint

In his complaint, Plaintiff alleges the following facts: Plaintiff was born on March 7, 1967. Plaintiff has a military

background and no criminal history or record. Plaintiff has a brother named Robert Lee, a fugitive wanted on robbery and assault charges in New Jersey dating from 1994. Robert Lee is estranged from his family and has not had any contact with any of them for a number of years. Robert has adopted many aliases over the past few years, including using the name and social security number of his brother, Plaintiff Julian Christopher Lee. Plaintiff alleges that the FBI was aware of this and routinely checked with Plaintiff's parents to determine whether Robert had been in contact with them.

According to the complaint, in late 1998, Defendant Jake Gregory, an FBI agent, contacted Plaintiff's old roommate Grace Kessler and ex-girlfriend Jana Dubraveak. Gregory allegedly told them that his inquiry concerned Plaintiff's brother, not Plaintiff. They both told Gregory that they did not know how to contact Plaintiff.

In April of 2000, Gregory contacted another old roommate of Plaintiff's, J.B., and asked him to come to Gregory's Carlsbad office to answer some questions. At the office, Gregory showed J.B. a photo of Robert Lee, and J.B. told Agent Gregory that he had never seen Robert Lee before. On April 28, 2000, Agent Gregory came to Plaintiff's house in Encinitas, California while Plaintiff was at work. Gregory spoke to Plaintiff's girlfriend's brother, Brian Ingraham. Gregory told Ingraham that his inquiry involved Plaintiff's brother, not Plaintiff, and left his business card and a note for Plaintiff to contact him.

Upon receiving the note, Plaintiff called Gregory back the same day. Plaintiff claims that he told Gregory that he had no idea where his brother was and that he had not spoken to him in a number of years. Plaintiff also demanded that Gregory stop following him and harassing his friends and acquaintances as neither he nor they knew the location of Robert Lee. Plaintiff then hung up the phone.

The following week, on May 4, 2000, a San Diego County Sheriff's Deputy was in Plaintiff's neighborhood questioning his neighbor about Plaintiff and his brother Robert. Later on the same day, Plaintiff's girlfriend, Sarah, saw a sheriff's car parked on the street and spoke with the deputy in the car, Marco Garmo. Deputy Garmo informed her that he was working for the FBI on the case involving Robert Lee and that there was an outstanding warrant for his arrest from Florida. Sarah explained to Deputy Garmo that the FBI had been looking for Robert Lee for years and that all she knew about Robert was the he was estranged from the Lee family. Plaintiff's girlfriend called him immediately and Plaintiff then called Deputy Garmo on Garmo's cellular phone, and explained to him that he had not spoken to his brother in years and did not know where he was.

Later that night, Plaintiff went to the supermarket. As he pulled into the parking lot, he was surrounded by several sheriff's cars and was ordered out of his car at gunpoint by the sheriffs, including Sheriff's Deputy Garmo. The officers told Plaintiff he was being arrested on the Florida warrant. The Florida warrant had been issued in Plaintiff's name and social security number ("SSN"), though some of the physical characteristics did not match (e.g. there was a significant difference between the weight of the person wanted in Florida [200 lbs.] and Plaintiff's weight [284 lbs.]). The officers handcuffed Plaintiff, placed him under arrest, and took him to the Encinitas Sheriff's Station.

Upon Plaintiff's arrival at the station, still handcuffed, he was placed in a room with FBI Agent Gregory. Plaintiff alleges that Gregory demanded that Plaintiff give him information on his brother, and that he said he would be able to clear up the "Florida situation" if Plaintiff gave him information on his brother. Complaint ¶ 23. Plaintiff claims that he told Gregory that he did not know where his brother was and that he had not heard from him or spoken to him in

years, after which Gregory allegedly replied "Have a nice trip to Florida" and walked out of the room. *Id.*

Plaintiff remained in jail four days until he was able to post bail on May 8, 2000. Also on May 8, 2000, extradition papers were filed to begin Plaintiff's extradition to Dade County, Florida. On May 9, 2000, Plaintiff was formally charged under the California Penal Code § 1551.1 with being a fugitive from justice. Shortly thereafter, Plaintiff's friends were able to hire an attorney who contacted the San Diego District Attorney's Office to inform them of Plaintiff's identity and his brother's history. Shortly after these events, Plaintiff was freed and his extradition case was dismissed by the San Diego District Attorney.

B. Defendants' Story

In support of their motion for summary judgment, Defendants submit a sworn affidavit by Agent Gregory, selected FBI "Bulletins," a copy of the Florida warrant, and a letter from the Gloucester County, New Jersey Prosecutor's Office.[1] The following are the facts related by the Defendants: the FBI became involved in investigating the unlawful flight of Robert Lee, Plaintiff's brother, based on robbery and aggravated assault charges dating back to 1994. On or about August 13, 1998, the San Diego FBI received a request to locate and interview the fugitive's brother, Julian Christopher Lee in order to inquire about Robert Lee's whereabouts. An agent spoke to Plaintiff's ex-girlfriend and roommate, neither of whom knew how to contact Plaintiff.

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[1] Plaintiff objects to Defendants' submission of the documents as "uncertified, unauthenticated copies of documents that purport to be FBI bulletins of some kind." Plaintiff's Opposition at 13. Plaintiff also states that the documents submitted are selective, and inappropriate as counsel for Defendants has refused to allow any discovery pending resolution of the instant motion. *Id.* at 13-15.

In July of 1999, the San Diego FBI received a second request to follow up on leads on the whereabouts of Robert Lee. The request listed the names and social security numbers of Keith Lee, Willmar Lee, Plaintiff (as "Christopher Lee") and Robert McMullen as possible aliases for Robert Lee (the other aliases were Robert Lee's older brothers' and his cousin's identities). The request listed two addresses for Christopher Lee, one in Miami, Florida and the other in Encinitas, California. The request also stated that "Christopher Lee" was wanted on a Florida warrant for assault, and that the social security number listed on that individual was the same as that of the Christopher Lee living in Encinitas, California. The request also contained an attachment from the New Jersey prosecutor's office that stated that as of 1997, Robert Lee was known to be using the name "Christopher Lee."

Agent Gregory was assigned to check on the "lead." Gregory went to Plaintiff's house in Encinitas, determined that Plaintiff was not home, and left a card with an individual with the message that Agent Gregory wished to speak to Plaintiff about his brother. Defendants claim that Plaintiff telephoned Agent Gregory, indicated that he did not wish to speak to the FBI, accused the FBI of harassing his friends and hung up.

Defendants claim that Agent Gregory was aware that there was an arrest warrant from Miami for "Christopher Lee" with the same date of birth and SSN as the individual that Gregory had been speaking to in Encinitas. Defendants claim that after Plaintiff refused to speak to Agent Gregory, Gregory believed it was possible that Plaintiff was uncooperative because he knew of the Miami warrant or, possibly that Plaintiff was actually the fugitive Robert Lee. Gregory called the police in Miami and determined that the arrest warrant was for Christopher Lee, that it was current, and that the Miami police were willing to extradite Christopher Lee from anywhere. As California law does

not allow federal agents to execute non-federal warrants, Agent Gregory passed on the information about the Miami warrant to the San Diego County Sheriff's Office, and indicated to his directing office in Sacramento that it was his intention to forego any further investigation as it appeared unlikely that Plaintiff would provide any information about his brother.

However, on May 4, 2000, after the San Diego Sheriffs had arrested Plaintiff and brought him in to the station, Gregory went to the Encinitas Station to determine whether Plaintiff had any information about his brother. Plaintiff denied any form of contact with his brother for several years. Defendants claim that Agent Gregory informed Plaintiff that if he assisted in locating his brother Robert, it might help Plaintiff's "Florida situation," but they deny that any promises were made.

C. Procedural History

On April 26, 2001, Plaintiff filed his initial complaint. On July 2, 2001, Plaintiff filed his first amended complaint naming Agent Jacob Gregory and the United States as defendants. On August 8, 2001, Defendants filed the instant motion to dismiss.

II. Discussion

A. Standard of Review

(i) Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) allows a court to dismiss a complaint for failure to state a claim upon which relief can be granted. Such a dismissal can be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). Under Rule 12(b)(6), a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his or her claim for relief. *See Levine v. Dia-*

manthuset, Inc., 950 F.2d 1478, 1482 (9th Cir. 1991). In applying this standard, the court must treat all of plaintiff's factual allegations as true. *See Experimental Eng'g. Inc. v. United Technologies Corp.*, 614 F.2d 1244, 1245 (9th Cir. 1980). On a Rule 12(b)(6) motion, the court assumes that all general allegations "embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995). However, the court does not have to accept as true conclusory allegations that contradict facts which may be judicially noticed or which are contradicted by documents referred to in the complaint. *See, e.g., Steckman v. Hart Brewing Inc.*, 143 F.3d 1293, 1295-1296 (9th Cir. 1998). The court, likewise, is not bound to assume the truth of legal conclusions simply because they are stated in the form of factual allegations. *See, Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981). To dismiss with prejudice, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven. *See Reddy v. Litton Indus.*, 912 F.2d 291, 293 (9th Cir. 1990), *cert. denied*, 502 U.s. 921 (1991).

(ii) Motion for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. Where the plaintiff bears the burden of proof at trial, summary judgment for the defendant is appropriate if the defendant shows that there is an absence of evidence to support the plaintiff's claims. *See Celotex Corp. v. Catrett*, 477 US 317, 325 (1986); *see also Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998). The movant has the initial burden of demonstrating that summary judgment is proper. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). The burden then shifts to the nonmovant to show that summary judgment is not appro-

priate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). To make such a showing, the nonmovant must go beyond the pleadings to designate *specific facts* showing that there is a genuine issue for trial. *See id.* However, in considering this motion, the evidence of the nonmovant is to be believed and all justifiable inferences are to be drawn in his or her favor. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255 (1986). Courts should be careful not to let a motion for summary judgment become a "trial on affidavits." *Id.* Determinations regarding credibility, the weighing of evidence, and the drawing of legitimate inferences are jury functions, not appropriate for resolution by the court in a motion for summary judgment. *See id.* at 255.

B. Analysis

Plaintiff's complaint makes eleven claims for relief: 1) a *Bivens* claim against Gregory; 2) violations of the California Civil Rights Act, Cal. Civ. Code § 51 against all Defendants; 3) false arrest/imprisonment against all Defendants; 4) malicious prosecution against all Defendants; 5) abuse of process against all Defendants; 6) battery against all Defendants; 7) intentional infliction of emotional distress against all Defendants; 8) negligence against all Defendants; 9) negligent infliction of emotional distress against all Defendants; 10) negligent supervision and training against the United States; and 11) negligent hiring and retention against the United States. All claims against the United States are brought pursuant to the Federal Tort Claims Act ("FTCA").

Defendant brings this motion to dismiss for the following reasons: 1) Plaintiff's common law tort claims against the United States are barred by the "discretionary function" exemption of the FTCA; 2) Plaintiff's common law torts are without merit; 3) Plaintiff has not stated a claim of discrimination under the California Civil Rights Act; and 4) Agent Gregory is entitled to qualified immunity.

As an initial matter, the court notes that Defendants have filed the instant motion seeking to have some claims dismissed under the motion to dismiss standard pursuant to Rule 12(b) and some claims dismissed under the summary judgment standard pursuant to Rule 56(c). Specifically, Defendant seeks to 1) dismiss *Bivens* claims against Agent Gregory based on qualified immunity pursuant to both Rule 12(b) and 56(c); 2) dismiss claims against the United States under the discretionary function exception of the FTCA pursuant to Rule 12(b) only; 3) dismiss Plaintiff's common law tort claims as without merit pursuant to both Rule 12(b) and 56(c); and 4) dismiss the California Civil Rights Act claims pursuant to Rule 12(b) only.

The complaint in this case was filed on April 26, 2001, and, to date, there has been no discovery conducted. As explained herein, the court finds that Defendants' motion for summary judgment are inappropriate at this stage of the litigation. In this motion for summary judgment, once Defendants show an absence of evidence to support Plaintiff's claim, the burden shifts to the Plaintiff to show particularized facts to rebut Defendants' motion for summary judgment, and yet, up to this time, Defendants have refused to provide any discovery, including interrogatories or depositions from Agent Gregory. Not only does this place an unfair burden on Plaintiff, it makes it very difficult for the court to get to the merits of many of Defendants' arguments, which require an analysis of the facts and circumstances surrounding Gregory's role in Plaintiff's arrest.

(i) Qualified Immunity

1. Applicable Law

First, Defendants claim that claims against Agent Gregory should be dismissed because he is entitled to qualified immunity. Claims of qualified immunity require a two step analysis. As a threshold matter, the court must consider whether the facts alleged, taken in the light most favor-

able to the party asserting the injury, show that the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. _, 121 S.Ct. 2151, 2156 (2001). If the allegations do not establish the violation of a constitutional right, "there is no necessity for further inquiries concerning qualified immunity." *Id.* at 2153 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). If an officer makes a reasonable mistake as to what the law requires, the officer is entitled to immunity. *Id.* at 2157.

Having identified the specific right at issue, the court must turn to whether that right was clearly established at the time the prosecutors allegedly interfered with that right. *See Anderson v. Creighton*, 483 U.S. 635, 640 (9th Cir. 1991) (citing *Todd v. United States*, 849 F.2d 365, 368-69 (9th Cir. 1988)). The plaintiff bears the burden of showing that the right allegedly violated was clearly established. *See Collins v. Jordan*, 110 F.3d 1363, 1369 (9th Cir. 1996).

A right is clearly established "[i]f the only reasonable conclusion from binding authority [was] that the disputed right existed." *Blueford v. Prunty*, 108 F.3d 251, 255 (9th Cir. 1997). "The contours of the right must be sufficiently clear that [at the time the allegedly unlawful action is taken] a reasonable official would understand that what he is doing violates that right." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quoting *Anderson*, 483 U.S. at 640). For a right to be clearly established, "the very action in question" need not "ha[ve] previously been held unlawful;" instead, the "unlawfulness must be apparent" in light of pre-existing law. *Anderson*, 483 U.S. at 640. "Thus, when the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established." *Mendoza*, 27 F.3d at 1361 (quoting *Casteel v. Pieschek*, 3 F.3d 1050, 1053 (7th Cir. 1993)); *see Backlund v. Barnhart*, 778 F.2d 1386, 1390 (9th

Cir. 1985) ("Certainly . . . [§ 1983 plaintiffs] need not always produce binding precedent. . . . There may be cases of conduct so egregious that any reasonable person would have recognized a constitutional violation.").

Plaintiff argues that at the time of Plaintiff's arrest, it was clearly established law that the knowing arrest of a person who is not the person described in the warrant is a violation of the Fourth Amendment. Plaintiff argues that the analysis focuses on whether a "reasonable officer could have believed could have believed that probably cause existed to arrest" Plaintiff. *Hunter v. Bryant*, 502 U.S. 224 (1991). This is an objective analysis, focused on a reasonable officer confronted with the facts and circumstances actually known to the defendant officer. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). Plaintiff further argues that it has been clearly established that a valid arrest under a warrant may only occur if the arresting officers reasonably believe the arrestee is the person sought in the warrant, citing to *Hill v. California*, 401 U.S. 797 (1971). In *Hill*, the Supreme Court found that "sufficient probability" is the touchstone of reasonableness under the Fourth Amendment. *Id.* at 804.

After an analysis of the applicable law, the court finds that the Plaintiff has sufficiently demonstrated that Agent Gregory may face § 1983/*Bivens* liability "for executing a warrant in an unreasonable manner," *see Bergquist v. County of Cochise*, 806 F.2d 1364, 1369 (9th Cir. 1986) (overturned on other grounds by *City of Canton v. Harris*, 489 U.S. 378 (1989)), and specifically for the arrest of a person with a warrant when the officer believes that the person is not the one named in warrant. Accordingly, the relevant question for the court is: Would a reasonable officer confronted with the facts and circumstances actually known to Agent Gregory have determined that there was a sufficient probability that Plaintiff was the person named in the Florida arrest warrant?

The court now looks at the allegations, taken in the light most favorable to Plaintiff, to consider whether they show that Agent Gregory violated Plaintiff's Fourth Amendment rights. Plaintiff alleges that the FBI and Agent Gregory were aware that Plaintiff's brother used a number of aliases, including assuming Plaintiff's identity. Plaintiff also alleges that the FBI was aware of Robert Lee's estrangement with the Lee family, and that Gregory questioned a number of witnesses who corroborated that fact. Plaintiff further alleges Gregory interviewed his former roommate, who confirmed by photo identification that Robert Lee was not the Christopher Lee that he knew in Encinitas. Plaintiff alleges that he contacted Gregory at Gregory's request, told him that he did not know the whereabouts of his brother, demanded that Gregory stop harassing him and his friends, and hung up on Gregory. Plaintiff alleges Gregory then secured the Florida warrant, and supplied it to the San Diego Sheriff's Department for the purpose of arresting Plaintiff. Plaintiff further alleges that Agent Gregory was at the Sheriff's Station to question him about his brother, promising Plaintiff to clear up the "Florida situation" if Plaintiff cooperated. When Plaintiff repeated that he did not know the whereabouts of his brother, he alleges that Gregory led Plaintiff to be jailed and extradited, even with the knowledge that the Florida warrant was not for Plaintiff.

Taking these facts as alleged, in the light most favorable to the Plaintiff, the court finds that Gregory's conduct would constitute a violation of Plaintiff's Fourth Amendment rights. *See Saucier*, 121 S.Ct. at 2156. Accordingly, the court denies Defendants' motion to dismiss claims against Agent Gregory based on qualified immunity.

2. Qualified Immunity on Motion for Summary Judgment

Defendants also request that the court grant summary judgment to Gregory based on qualified immunity. The

Supreme Court has held that because qualified immunity entitles government officials to "an immunity from suit rather than a mere defense to liability," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), it is essential that "insubstantial claims" be resolved as quickly as possible. *Anderson v. Creighton*, 483 U.S. 635 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Saucier*, 533 U.S. __, 121 S.Ct. 2151, 2156 ("Qualified immunity is an 'entitlement not to stand trial or face the other burdens of litigation.'") (citation omitted).

Nonetheless, while qualified immunity is usually to be determined "at the earliest possible point in the litigation," *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993); *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir. 1997); *Saucier*, 533 U.S. __, 121 S.Ct. at 2155-56, a court order granting summary judgment in favor of moving defendants is inappropriate where a genuine issue of material fact prevents a determination of qualified immunity until after trial on the merits. *See Act Up!/Portland*, 988 F.3d at 873; *Sloman v. Tadlock*, 21 F.3d 1462, 1467-68 (9th Cir. 1994); *Thorsted v. Kelly*, 858 F.2d 571, 575 (9th Cir. 1998) (citing cases finding that qualified immunity from damages may be asserted at trial); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 841 n. 5 (1998) ("[T]he better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.").

In support of their motion, the Defendants submits certain documents from the FBI and an affidavit from Agent Gregory. However, the Defendants are requesting summary judgment in the absence of any discovery, solely on the basis of documents and affidavits Defendants have chosen. The court finds that this motion is premature. Having cleared the hurdle of showing that on the basis of Plaintiff's allegations, viewed in the light most favorable to Plaintiff, Gregory's conduct violated clearly established law,

Plaintiff deserves an opportunity to engage in discovery. Accordingly, the court finds that Defendants' motion for summary judgment based on qualified immunity is premature. After both sides have had an opportunity to engage in appropriate discovery, Defendants may resubmit their motion for summary judgment based on qualified immunity.

(ii) Discretionary Function Exemption

Defendants argue that Plaintiff's claims against the United States should be dismissed because the court lacks jurisdiction over them under the FTCA, because Agent Gregory's action fall under the "discretionary function" exception of the FTCA.

Suits against the United States and its agencies are barred by sovereign immunity unless permitted by an explicit waiver of immunity from suit. *See FDIC v. Meyer*, 510 U.S. 471 (1994). Congress waived the United States' immunity from suits for money damages for traditional tort claims when it passed the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, which provides that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. This broad waiver of immunity is subject to various limitations.

Only one exception is at issue in this case—the "discretionary function" exception codified at 28 U.S.C. § 2680(a). That section provides that the FTCA's provisions shall not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part

> of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). The discretionary function exception is designed to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort." *United States v. Gaubert*, 499 U.S. 315, 323 (1991). The Supreme Court has also admonished that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." *United States v. Varig Airlines*, 467 U.S. 797, 813 (1984).

To determine whether the discretionary function exception is applicable, courts typically determine first whether the challenged action involves an element of choice of judgment. *See United States v. Berkovitz*, 486 U.S. 531, 536 (1988). The exception does not apply when "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* Second, assuming an action does involve an element of choice or judgment, courts must decide whether that choice or judgment is of the type that Congress intended the discretionary function exception to shield. *Id.* Only those exercises of judgment which involve considerations of social, economic, and political policy are excepted from the FTCA by the discretionary function doctrine. *See Varig Airlines*, 467 U.S. at 814. The United States has the burden of proving that the discretionary function exception applies. *See Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). In cases in which the exception does apply, the court lacks subject matter jurisdiction over the action. *See Lesoeur v. United States*, 21 F.3d 965, 967 (9th Cir. 1994); *Sabow v. United States*, 93 F.3d 1445, 1451 (9th Cir. 1996).

Defendant argues that the court's analysis is objective, focusing on the nature of the actions taken and whether

they are susceptible to policy analysis, rather than subjective, based on the agent's intent in exercising the discretion conferred by statute or regulation. *Lesoeur*, 21 F.3d at 967-68. Relying primarily on a case from the Third Circuit, the Defendants argue that investigative acts of an agent are by definition ground in policy consideration. *Pooler v. United States*, 787 F.2d 868, 871 (3rd Cir. 1986); see also *Sabow*, 93 F.3d at 1454 (finding that the discretionary function exception covered an FTCA claim arising from a negligent investigation by the Naval Investigative Service and Judge Advocate General into the apparent suicide of a Marine Corp officer). The Defendants specifically argue that the discretionary function exception has been held to bar claims against the United States in cases of mistaken arrest. *See Rourke v. United States*, 744 F.Supp. 100 (E.D. Pa 1989); *Mesa v. United States*, 837 F.Supp. 1210 (S.D. Fla. 1993). Defendant argues that because all of Agent Gregory's actions with respect to Plaintiff were based on his investigation of a wanted fugitive, the discretionary function exception bars all claims against the United States.

However, as Plaintiff points out, the Ninth Circuit (as well as other Circuits) has not adopted a blanket use of the discretionary function exemption to any aspect of an agent's investigation, as Defendants suggest has been adopted in certain other Circuits. The Ninth Circuit has found that:

> Government action is discretionary if the action is of the nature and quality that Congress intended to shield from tort liability. Congress wished to prevent judicial 'second guessing' of legislative and administrative decisions ground in social, economic, and political policy through the medium of an action in tort.
>
> While law enforcement involves exercise of a certain amount of discretion on the part of individual officers, such decisions do not involve the sort of generalized

> social, economic and political policy choices that Congress intended to exempt from tort liability. *See Caban v. United States*, 671 F.2d 1230 (2d Cir. 1982) (INS decision whether to detain alien based on alien's appearance and ability to answer questions about his homeland not a discretionary function under FTCA).

Garcia v. United States, 826 F.2d 806, 809 (9th Cir. 1987).

For example, in *Patel v. United States*, the court found that while some actions taken by officers in the course of serving a search warrant involve matters of judgment or choice, not all of those decisions are based on consideration rooted in economic, social or political policy. 806 F.Supp. 873, 878 (N.D.Cal. 1992). In general, governmental conduct cannot be discretionary if it violates a legal mandate. *See United States Fidelity & Guaranty Co. v. United States*, 837 F.2d 116, 120 (3d Cir.) *cert. denied*, 487 U.S. 1235, 108 S.Ct. 2902, 101 L.Ed.2d 935 (1988). The Ninth Circuit has specifically held that the constitution may limit the discretion of federal officials such that the discretionary function exception to waiver of the United States' sovereign immunity under the FTCA will not apply. *Nurse v. United States*, 226 F.3d 996 (9th Cir. 2000) (officials do not have discretion to create unconstitutional policies). As the court has already found that the alleged facts, viewed in the light most favorable to Plaintiff, Gregory's conduct violated clearly established constitutional law, at this stage of the proceedings, the court finds that Plaintiff's claim is not barred by the discretionary function exception to the FTCA. Accordingly, the court will not bar all claims against the United States based on the discretionary function exception.

Defendants also argue that Claims 10 and 11, for negligent supervision and training and negligent hiring and retention, are barred by the discretionary function exception. Plaintiff does not oppose the dismissal of these two claims. Decisions relating to hiring, training and super-

vision of employees involved policy judgments of the type that Congress intended to be shielded by the discretionary function exception. *Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000). The court therefore grants Defendants' motion to dismiss Claims 11 and 12 with prejudice.

Accordingly, the court grants Defendants' motion to dismiss Claims 11 and 12 with prejudice. The court further denies Defendants' motion to dismiss Claims 1 through 10 against the United States under the discretionary function exception to the FTCA.

(iii) Tort Claims

1. Failure to State a Claim because Agent Gregory did not Perform Arrest

Defendant argues that Plaintiff's claims for false arrest/imprisonment and battery fail to state a claim because it was the San Diego Sheriff's Department, not Agent Gregory who effectuated Plaintiff's arrest. The court does not agree. According to applicable California law,

> There shall be no liability on the part of, and no cause of action shall arise against, any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if the peace officer in making the arrest acts without malice and in the *reasonable belief* that the person arrested is the one referred to in the warrant.

California Civil Code § 43.55 (emphasis added); *see also Ting v. United States*, 927 F.2d 1504, 1514 (9th Cir. 1991).

In *Ting*, the Ninth Circuit found that "malice," as that term is used in § 43.55, refers "not to the actual physical execution of the warrant, but to the officer's state of mind in *procuring* or *executing* the warrant." *Id.* (emphasis added).

> For instance, malice for purposes of § 43.55 has been found in situations where the officer purposefully withheld exculpatory evidence from the magistrate issuing the arrest warrant, *Laible v. Superior Court*,

157 Cal.App.3d 44, 53, 203 Cal.Rptr. 513, 518 (1984), where the officer knowingly used false information in order to obtain the warrant, *McKay v. County of San Diego*, 111 Cal.App.3d 251, 255-56, 168 Cal.Rptr. 442, 444-45 (1980), or where the officer executes the warrant with knowledge that it has been recalled or is no longer valid. *Milliken v. City of South Pasadena*, 96 Cal.App.3d 834, 842, 158 Cal.Rptr. 409, 413 (1979).

Id. In the instant case, while Plaintiff admits that Agent Gregory did not personally arrest Plaintiff, Plaintiff alleges that Gregory worked with the San Diego Sheriffs and directed them to arrest Plaintiff with a warrant that Agent Gregory knew was for another person. The court finds that an officer may equally be held liable where an officer procures an arrest warrant from a foreign jurisdiction for the purposes of having a person not really wanted in that warrant falsely arrested to pressure him to provide information, as has been alleged in the instant case. Accordingly, the court denies Defendants' motion to dismiss based on the fact that Agent Gregory did not perform the arrests himself.

2. Failure to State a Claim because Agent Gregory could have Reasonably Believed Plaintiff was the Person Named in the Warrant

Defendants argue that Plaintiff's tort claims for malicious prosecution, abuse of process and negligent infliction of emotional distress should be dismissed both for failure to state a claim and under the summary judgment standard. Defendants argue that even though Plaintiff alleges that Agent Gregory knew Plaintiff was not the subject of the Florida warrant, there is not a "scintilla of evidence" that Gregory knew that Plaintiff was not the individual sought in the Florida warrant or that it was unreasonable to believe that Plaintiff was that individual. Defendants' P&A at 13. Defendants argue that "as it was reasonable for Gregory to

believe that Plaintiff was the person named in the arrest warrant, [Plaintiff's claims] cannot succeed." *Id.*

On a motion to dismiss, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his or her claim for relief. *See Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1481 (9th Cir. 1991). In applying this standard, the court must treat all of plaintiff's factual allegations as true. *See Experimental Eng'g. Inc. v. United Technologies Corp.*, 614 F.2d 1244, 1245 (9th Cir. 1980). On a Rule 12(b)(6) motion, the court assumes that all general allegations "embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 19940, *cert. denied*, 515 U.S. 1173 (1995). As the court has previously stated, Plaintiff's allegations, construed in the light most favorable to Plaintiff, support a conclusion that Agent Gregory knew that Plaintiff was not the person named in the warrant, and that he acted to have Plaintiff arrested under that warrant. Accordingly, the court denies Defendants' motion to dismiss based on an alternate theory that Agent Gregory reasonably believed that Plaintiff was the person named in the warrant.

To the extent that the Defendants are requesting that the court analyze Gregory's reasonableness based on the standard set forth for summary judgment, the court declines to do so. As Plaintiff points out, such a determination would require the court to look beyond the complaint at the facts and circumstances surrounding Agent Gregory's role in Plaintiff's arrest. As the court has previously stated, there has not yet been any discovery in this action, and without the benefit of additional facts the court is unable to examine the merits of Defendants' argument. Accordingly, the court denies Defendants' motion for summary judgment in regards to these claims as premature.

3. Failure to State a Claim because there was no Outrageous Conduct by Gregory

Defendant moves to dismiss Plaintiff's claim of intentional infliction of emotional distress because there was no "outrageous conduct" by Agent Gregory, one of the elements of the offense. However, as Plaintiff points out, the Ninth Circuit has held that false arrest may constitute a claim for intentional infliction of emotional distress, stating that if a plaintiff can "prove that the arresting officers arrested them with the intent of inflicting emotional distress [as Plaintiff alleges], [plaintiffs] can assert both false arrest and emotional distress claims." *Gasho v. United States*, 39 F.3d 1420, 1434 (9th Cir. 1994). Accordingly, the court denies Defendants' motion to dismiss based on the alleged lack of "outrageous conduct."

(iv) California Civil Rights Act

Defendants argue that Plaintiff has failed to state a claim under the California Civil Rights Act, Cal Civ. Code § 51 et seq. in Claim 2. The Unruh Civil Rights Act is codified at section 51 *et seq.* of the California Civil Code. Section 51 states: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color religion, ancestry, national origin, or disability. . ." Cal. Civ. Code § 51. Plaintiff alleges that he is African American, and that Defendants violated his right to be free of any violence committed against him because of his race. Defendant argues that Plaintiff has presented no evidence supporting his claim of discriminatory treatment based on race. Plaintiff does not offer an argument in opposition. After a review of the complaint, the court can find no allegations that support Plaintiff's assertion that Gregory's conduct was motivated by racial discrimination, aside from Plaintiff's conclusory statement that his rights under the Unruh Act were violated. The court is not bound to assume the truth of legal conclusions simply because they are stated in the form of factual allegations. *See Western*

Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981). Accordingly, in the absence of any allegations to support Plaintiff's claim under the Unruh Act, the court grants Defendants' motion to dismiss this claim, and dismisses Claim 2 without prejudice. If Plaintiff wishes to restate this claim, he may do so within 30 days of the day this order is stamped "filed."

III. Conclusion

For the foregoing reasons, the court GRANTS IN PART and DENIES IN PART Defendants' motion to dismiss, and accordingly, DISMISSES Claims 10 and 11 with prejudice. The court further DISMISSES Claim 2 without prejudice. Also as stated herein, the court DENIES Defendants' motion for summary judgment as premature. Plaintiff shall have 30 days to reallege Claim 2.

IT IS SO ORDERED.

9/27/01
Date

/s/ Judith N. Keep
Judge Judith N. Keep
United States District Court
Southern District of California

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JULIAN C. LEE,
PLAINTIFF-APPELLEE,

v.

JAKE GREGORY, UNITED STATES OF AMERICA,
DEFENDANTS-APPELLANTS,

AND

THE FEDERAL BUREAU OF INVESTIGATION,
DEFENDANT.

No. 02-57132

D.C. No. CV-01-00739-K/RBB
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO

Filed April 15, 2005

ORDER

Before: NOONAN, THOMAS, and BEA, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing. Judges Thomas and Bea have voted to deny the petition for rehearing en banc, and Judge Noonan so recommends.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). The petition for panel rehearing and the petition for rehearing en banc are DENIED.

APPENDIX E

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

(3)

No. 05-344

In The

Supreme Court of the United States

JAKE GREGORY,

Petitioner,

v.

JULIAN C. LEE,

Respondent.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

(1) Does the Court have jurisdiction?

(2) In deciding the issue of the objective reasonableness of police conduct under the Fourth Amendment, is it appropriate to determine the knowledge of the officer at the time of the questioned conduct?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Jake Gregory was the appellant in the Court of Appeals and a defendant in the district court. Respondent Julian C. Lee was the appellee in the Court of Appeals and the plaintiff in the district court. The United States of America was a defendant in the district court, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, but is not a party to the petition for a writ of *certiorari*.

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JURISDICTION

Petitioner Gregory has invoked the jurisdiction of this Court under 28 U.S.C. § 1254(1). Respondent believes that the Court of Appeals was without jurisdiction in the first instance under 28 U.S.C. § 1291, and that *Johnson v. Jones*, 515 U.S. 304 (1995) precludes review. This issue is addressed in detail *infra*.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Court of Appeals correctly applied the proper legal standard under *Graham v. Connor,* 490 U.S. 286, 397 (1989) to the analysis of petitioner Gregory's involvement in the false arrest of respondent Julian Lee. The Court of Appeals analyzed Gregory's asserted qualified immunity defense to liability under *Saucier v. Katz*, 553 U S. 194, 207 (2001). The Court of Appeals asked, in accord with *Saucier,* whether, taken in the light most favorable to the plaintiff, the facts showed that the officer's conduct violated Mr. Lee's constitutional rights. Second, the Court asked if the right violated was clearly established in light of the specific context of the case.

Far from relying on a "subjective" analysis of intent, the Court of Appeals determined that for Fourth Amendment

analysis, Gregory's motives for his conduct were irrelevant. Citing this Court's holding in *Whren*, the Court of Appeals ruled that:

> Gregory is correct that allegations of ulterior motives cannot invalidate police conduct that is justified by probable cause. *Whren v. United States*, 517 U.S. 806, 811-15 (1996). Thus, if Gregory's motive in causing Julian's arrest was to squeeze Julian for information about Robert, *Whren* does render such motive irrelevant. However, Gregory's contention ignores the fact that his conduct must be "objectively reasonable ***in light of the facts and circumstances confronting him without regard for [his] underlying intent or motivation.***" *Graham v. Connor*, 490 U.S. 386, 397 (1989) (emphasis added). Gregory's actions are not impugned because of his motive but because of his claimed knowledge that Julian was not the person named in the Florida arrest warrant.

Pet. App. 7a.

Gregory's complaint, that the Court of Appeals improperly introduces subjective intent into the analysis, is belied by the explicit language of the decision. He confuses the issue of motive or intent with the requisite inquiry into the officer's knowledge at the time of the questioned action, without which the objective reasonableness of the officer's conduct cannot be determined. Moreover, Gregory's argument is based on a rendition of facts most favorable to him, which is exactly the opposite of the requirements of this Court's cases. Because his interlocutory appeal was based on factual issues in the Court of Appeals, *Johnson v. Jones*, 515 U.S. 304 (1995), deprived

the Court of Appeals of jurisdiction *ab initio* and requires denial of Gregory's petition.

Gregory's repeated accusations that plaintiff has attempted to inject subjective analysis of intent into the Fourth Amendment issue of objective reasonableness misconstrues the allegations of Mr. Lee's complaint and the procedural posture of the summary judgment motions in the District Court. By selectively quoting factual submissions that had been made in the district court to support Mr. Lee's First Amendment retaliation claim and the state law-based FTCA claims, in his discussion of the Fourth Amendment issue, Gregory, whether deliberately or not, has confused the facts relevant to the intent-based causes of action with the Fourth Amendment false arrest violation and has attributed arguments to the petitioner which he never made. A review of the facts of the case, the complaint and the proceedings in district court will clarify the case. This review will demonstrate Gregory's factual submissions to be misleading and his legal argument to be without merit.

FACTS

Taken in the light most favorable to Julian Lee, these are the facts:

The son of a police officer, Julian Christopher Lee was thirty-five years old at the time of the events in this case. (C.A.E.R. 206). He had never been in trouble with the law, and had no criminal record. *Id.*

After high school Julian joined the Marines. *Id.* As a Marine, Julian was a weapons instructor at the Marine

Corps Base in Quantico, Virginia, where he taught military officers as well as FBI agents and DEA agents how to handle weapons. *Id.* After service in the First Gulf War, Julian lived for several years in San Diego, California, save for a brief stint while working as a commercial fisherman in Alaska. (C.A.E.R. 207). He had never been to Miami, Florida. *Id.*

Julian had an older brother named Robert Q. Lee. Robert had been in trouble with the law since he was a minor. Since at least 1993, Robert Lee has been wanted in Gloucester County, New Jersey for armed robbery and aggravated assault. (C.A.E.R. 84).

In February, 1997, the Gloucester County, New Jersey County Prosecutor requested the assistance of the United States Attorney's Office for New Jersey in locating Robert Q. Lee, who had been charged in a New Jersey state court with armed robbery and aggravated assault (App. 33-34). The Gloucester County prosecutor sent a letter to United States Attorney Jeremy Frey of the District of New Jersey. *Id.* The letter stated that Robert Q. Lee "has changed his name to Christopher Lee DOB 3/7/67." (App. 33). The state prosecutor requested that the United States Attorney charge Robert Q. Lee with unlawful flight to avoid prosecution under 18 U.S.C. § 1073, a federal offense. *Id.*

The day after Mr. Frey received this letter, William Grace, a special agent of the FBI, filed a sworn affidavit in support of a complaint alleging unlawful flight to avoid prosecution against Robert Q. Lee in the United States District Court for New Jersey. (App. 37-39). The complaint stated that the FBI had received information that Robert Q. Lee had "changed his name to Christopher Lee." (App. 38).

In August, 1998, a San Diego FBI agent, William Espino, was assigned a "lead" to interview Robert Q, Lee's brother, Julian Christopher Lee. (C.A.E.R 78). The lead described Julian as a male, d.o.b. 03/07/1967, 6'3" tall and weighing 270 pounds, with brown hair and brown eyes. (C.A.E.R. 79). Espino was unable to locate Julian C. Lee. *Id.*

In July, 1999, Jake FBI Agent Gregory was assigned a "lead" to interview Julian Lee to seek information as to the whereabouts of the fugitive Robert Q. Lee. *Id.* The "lead" noted that the Metro-Dade Police Department maintained an arrest warrant for a "Christopher Lee." *Id.*

The FBI file contained a wanted poster with two photographs of Robert Q. Lee. (C.A.E.R. 85). The poster set forth Robert Lee's known aliases, including "Christopher Lee." *Id.* The poster noted that Robert Lee's "other" social security numbers included 149-28-3215 (Julian Lee's actual social security number) and that his "other" dates of birth included March 7, 1967 (Julian Lee's actual date of birth). *Id.* Several years before his arrest, Julian Lee became aware that his estranged brother Robert was using his name and identifying data. (App. 28). He learned this because the FBI had reported to another of Julian's brothers and to a cousin that Robert was using the names and social security numbers of family members while he was a fugitive. *Id.* The outstanding state arrest warrant from Dade County, Florida for Christopher Lee (the known alias of Robert Lee) carried a description of physical characteristics that were grossly dissimilar to those of Julian Lee (a difference of two inches in height and 70 pounds in weight), but matched more closely the physical description of the fugitive Robert Q. Lee. The Florida warrant described a suspect 6'1" and 200 pounds. (C.A.E.R. 80, 83). The last description of Robert Q. Lee

was from 1994 and put his height at 6'0" and his weight at 180 pounds. (C.A.E.R. 128).

In early 2000, in an attempt to locate Julian Lee, Gregory interviewed J.B. Kleiman. Mr. Kleiman told Gregory that Julian had lived with him in his house for about six months and that Julian had been "very kind" to Mr. Kleiman's grandmother, who was dying at the time. (C.A.E.R. 170-171). Mr. Kleiman told Gregory that Julian Lee was over six feet tall and weighed more than 200 pounds (*i.e.*, he did not match the physical description on the Florida warrant). (C.A.E.R. 172). Gregory showed Mr. Kleiman pictures of Robert Q. Lee; Kleiman said that those were not pictures of plaintiff. *Id.*

Gregory knew before Julian's arrest that the federal warrant was for Robert Q. Lee a/k/a Christopher Lee; that the Gloucester County Prosecutor had reported that Robert Q. Lee had changed his name to Christopher Lee using Julian's date of birth; that the FBI's own wanted poster listed Robert Q. Lee with the alias Christopher and stated that Robert Q. Lee was living under the name Christopher Lee in 1997. Gregory's file contained a 1994 mug shot of Robert Q. Lee reflecting a height of 6 feet tall and a weight of 180 pounds. (C.A.E.R. 50-51, 117-120, 124-128).

On April 21, 2000, Gregory went to Julian's home in Encinitas, California and left a business card with one of Julian's friends, requesting that Julian call him. (C.A.E.R. 79, 310). That same day, Julian telephoned Gregory and identified himself as Julian Christopher Lee. (App. 29). Julian asked if there was any law that required him to speak with the FBI. *Id.* Gregory said that there was not. *Id.* Julian told Gregory to stop harassing him and his friends. (App. 30). Julian explained that he had not seen

Robert Q. Lee for many years. *Id.* Julian cursed and hung up the telephone. *Id.*

Agent Gregory was "a little upset" when Julian hung up on him. (C.A.E.R. 197, 310). Although he had known that there was an outstanding arrest warrant in Florida for a "Christopher Lee," since he had received the lead in July, 1999 and had done nothing with respect to it, Gregory now acted. (C.A.E.R. 172-173). Immediately after the telephone call in which Mr. Lee complained of Gregory's actions, cursed and then hung up, Gregory telephoned the Dade County Sheriff's Office and had that office fax him a copy of the 1998 Florida state warrant for "Christopher" Lee. (C.A.E.R. 79-80, 197).

The same day, April 21, 2000, Gregory called the San Diego Sheriff's Department's Encinitas Substation and "briefed" the watch commander, Sergeant Bulow. (C.A.E.R. 80). He then faxed Sergeant Bulow a copy of the Florida warrant. *Id.* Within 30 minutes of his call with Sergeant Bulow, Gregory appeared at the Encinitas Substation. (C.A.E.R. 218-219). He told Sergeant Bulow that there was a "Florida warrant for a man living in Encinitas, California" and asked Bulow if the Sheriff's Department "could help serve it." (C.A.E.R. 219). Gregory gave Bulow Mr. Lee's address and a description of his car. *Id.* Gregory told Bulow that "the suspect is a large man" and gave Bulow the copy of the warrant. *Id.*

Gregory gave Julian's home address to Sergeant Bulow and said that address was where Christopher Lee, the Florida warrant suspect, lived. (C.A.E.R. 219, 224, 312). Agent Gregory also gave Sergeant Bulow a description of Julian's car and told him it belonged to the same Florida warrant suspect. (C.A.E.R. 219, 312).

Gregory never informed Bulow that the warrant might not pertain to Julian Lee; nor did he disclose to Bulow that Robert Q. Lee had misappropriated Julian Lee's middle name, social security number and date of birth. (C.A.E.R. 100-101). He did not suggest that the applicability of the Florida warrant to Julian Lee required any inquiry before the sheriffs executed the warrant. (C.A.E.R. 101).

Sergeant Bulow then told San Diego County Sheriff's Deputy John Maryon and his partner, Deputy Marco Garmo about the warrant. (C.A.E.R. 221, 311). At one point Maryon called Gregory because he was curious about how Gregory had obtained the warrant. (C.A.E.R. 222, 311). Gregory told Maryon that he wanted to be contacted when Julian was arrested so he could talk to Julian. (C.A.E.R. 223).

In deposition, Agent Gregory said he did not remember what information he had given to the state deputies after unequivocally telling Bulow that Julian Lee was the subject of the Florida warrant:

> Q: Did you advise Deputy Maryon that the Plaintiff's identity had been misappropriated by the Plaintiff's brother?
>
> A: I don't remember whether I advised him of that . . . .
>
> Q: Did you tell him that the federal fugitive had used the alias "Christopher" Lee?
>
> A: I don't remember if I told him that or not. . . .
>
> Q: Didn't you tell them that you were investigating a fugitive who had used the alias Christopher Lee?

A: I don't remember if I told them that.

Q: What could refresh your recollection?

A: Perhaps Divine Intervention. (C.A.E.R. 312).

Deputy Maryon swore that:

> At no time during my contact with Gregory did he inform me that the warrant did not apply to the plaintiff, that the warrant's applicability to plaintiff needed to be investigated, that plaintiff's identity including his name, social security number and date of birth had been misappropriated by plaintiff's brother or that plaintiff's brother used plaintiff's name as an alias. (C.A.E.R. 231).

Garmo and Maryon both testified that they would never have arrested Julian if Agent Gregory told them that Robert Q. Lee had misappropriated his identity. (C.A.E.R. 212, 312-313).

Deputy Garmo testified:

Q: In other words, Maryon never told you that he had learned from the FBI that the FBI had knowledge that the wanted brother of this person had misappropriated his identity and was going under that name?

A: No. The FBI never gave us that information. If, in fact, if we had that information, we would not have arrested him. . . .

Q: But what you just said was that if the FBI told you that the wanted brother had used this man's identity, you wouldn't have effected the arrest?

> A: Of course not. It would have been an unlawful arrest.

(C.A.E.R. 211-212).

On May 4, 2000, Deputy Maryon and his partner, Garmo, arrested Julian on the Florida warrant as Julian was driving to the store. They decided not to do a felony hot stop because Julian seemed like a "nice guy" and "didn't seem to be too much a threat." (C.A.E.R. 225-226 313). Julian was very "cooperative" during the arrest. (C.A.E.R. 90, 313). Julian told the deputies that he was not the person wanted by the warrant, that he had never been to Florida; and that his brother was using his identification. (C.A.E.R. 313). Julian repeatedly told the deputies they were making a mistake, "several times, over and over." *Id.*

As he had promised, Maryon telephoned Gregory, who arrived at the station within 15-20 minutes. Gregory spoke to Julian, who was in a holding cell. (App. 30). Gregory told Julian:

> Are you ready to talk to me now? The last time I talked to you, you had an attitude. Do you want to go home? Do you want to get out of here tonight? Then tell me where your brother is.

Id. Gregory also told Julian Lee, "If you want to get out of this Florida situation, you better talk to me now about your brother, otherwise you will be staying here in jail." *Id.*

Julian told Gregory that he did not know where his brother was and that he had not seen him for many years. *Id.* He told Gregory that his brother had been using his name and social security number and that his family

actually learned this information from the FBI itself, several years earlier. *Id.*

Julian Lee told Gregory that Julian had never been to Florida; he said that he was not the person named in the warrant; he pointed out that he was several inches taller, almost 100 pounds heavier (he weighed 290 pounds on the day of the arrest); had a different hair style, different color eyes, and a different complexion. Julian told Gregory that Gregory could call Julian's "job" and that his employers could verify that he had been working there since June, 1998 and could not have committed a crime in Florida in December, 1998. (App. 30-31).

Julian Lee asked Gregory to "check" because Gregory was arresting the wrong person (App. 31). Gregory smiled and asked again for information regarding Robert Lee. *Id.* When Julian Lee stated, at one point, that he was not the person named in the Florida warrant and had never been in Florida, Gregory did not object. *Id.* Gregory smiled and stated that Julian Lee's name and the name on the warrant were the same. *Id.* Gregory said that, if Julian wanted to clear the matter up, he had better provide the information Gregory wanted. *Id.* After Julian Lee reiterated that he had no information about his brother, Gregory smiled again, threw up his hand and said, "Have a nice flight to Florida." *Id.*

Julian Lee filed a complaint against Gregory pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.* The complaint alleged in its *Bivens* action that Gregory's actions had violated, *inter alia*, (1) Julian Lee's First Amendment right to speak as he

felt appropriate to government agents without threat of vindictive governmental reprisal or retaliation; and (2) Julian Lee's Fourth Amendment right to be free of unreasonable search and seizures and to be free of arrests without probable cause. (App. 9). The First Amendment claim was based upon *City of Houston v. Hill*, 482 U.S. 451 (1987) (the arrest of a citizen for protesting a police action is a violation of the First Amendment). The First Amendment claim was an intent-based tort under *Crawford-El v. Britton*, 523 U.S. 574 (1998).

The complaint alleged that " . . . by causing the arrest and continued detention of Julian Lee, defendant Gregory arrested him without probable cause, in an unreasonable manner, under circumstances that would lead a reasonable person to believe that there was no probable cause to arrest Julian C. Lee." *Id.*

The *Bivens* count alleged that Gregory caused the arrest and continued detention "to retaliate against Julian C. Lee for what Mr. Lee had said to Gregory in enunciating his complaints with Gregory's action, which comments were protected by the First Amendment." (App. 10).

Count one sought punitive damages against Gregory based on the oppressive, fraudulent and malicious nature of the conduct. (App. 11). The complaint also alleged, under the Federal Tort Claims Act, the following causes of action in these counts: (2) a violation of the Unruh Act, a state statute (California Civil Code § 51, *et seq.*); (3) false arrest and false imprisonment; (4) malicious prosecution, which alleged a favorable termination of the extradition action and that Gregory acted with malice; (5) abuse of process; (6) battery; (7) intentional infliction of emotional distress; (8) negligence; (9) negligent infliction of emotional

distress; (10) negligent supervision and training; and (11) negligent hiring and retention.

Defendants Gregory and United States filed a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Criminal Procedure and an early motion for summary judgment. The district court dismissed counts 2, 10 and 11, denied the balance of the motion to dismiss, and ruled that the complaint stated a claim sufficient to permit discovery. (C.A.E.R. 27-44). The district court's ruling on this motion belies Gregory's claim that the court relied upon some impermissible "subjective" test in permitting the case against him to go forward.

> Plaintiff argues that the analysis focuses on whether a "reasonable officer could have believed that probable cause existed to arrest" Plaintiff. *Hunter v. Bryant*, 502 U.S. 224 (1991). This is an objective analysis, focused on a reasonable officer confronted with the facts and circumstances actually known to the defendant officer. *Act Up!/ Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993). Plaintiff further argues that it has been clearly established that a valid arrest under a warrant may only occur if the arresting officers reasonably believe the arrestee is the person sought in the warrant, citing to *Hill v. California*, 401 U.S. 797 (1971). In *Hill*, the Supreme Court found that "sufficient probability" is the touchstone of reasonableness under the Fourth Amendment. *Id.* at 804.
>
> After an analysis of the applicable law, the court finds that the Plaintiff has sufficiently demonstrated that Agent Gregory may face § 1983/ *Bivens* liability "for executing a warrant in an unreasonable manner." See *Bergquist v. County of Cochise*, 806 F.2d 1364, 1369 (9th Cir. 1986)

> (overturned on other grounds by *City of Canton v. Harris*, 489 U.S. 378 (1989)), and specifically for the arrest of a person with a warrant when the officer believes that the person is not the one named in the warrant. Accordingly, the relevant question for the court is: Would a reasonable officer confronted with the facts and circumstances actually known to Agent Gregory have determined that there was a sufficient probability that Plaintiff was the person named in the Florida arrest warrant? (C.A.E.R. 35)

The district court's ruling also addressed the ***mental element*** to be proven on the issue of the false arrest cause of action alleged under the Federal Torts Claims Act, which required proof of malice. (C.A.E.R. 42-43).

After discovery Gregory filed a motion for summary judgment as to the *Bivens* claim, while the United States sought judgment on the Federal Torts Claims Act causes of action. Gregory argued that, because he himself did not perform an arrest or take Mr. Lee into custody, he violated no federally protected right of Mr. Lee. He argued that, because the Florida warrant was "facially valid" and matched Julian Lee's name, gender, race, date of birth, and social security number, Gregory's "limited role" in obtaining a copy of the felony arrest warrant from law enforcement authorities in one state and then providing it to local law enforcement authorities elsewhere "did not give rise to any constitutional violation." Finally, Gregory argued that there was no clearly established law by which a reasonable agent could know of the illegality of the conduct.

The district court denied Gregory's motion for summary judgment, holding that procuring an unlawful arrest

can give rise to liability and finding that factual disputes made summary judgment inappropriate. (C.A.E.R. 232-246). The district court found that factual disputes as to whether Gregory acted with malicious intent precluded summary judgment on the false arrest, malicious prosecution and abuse of process causes of action. (C.A.E.R. 242-243).

The Court of Appeals' ruling on Gregory's interlocutory appeal rejected Gregory's claim that he could not be liable because he did not personally effect the arrest. It held that Gregory's intent or motive in causing Julian Lee's arrest was irrelevant to the analysis of Mr. Lee's Fourth Amendment claim. This claim, the Court held, must be resolved on an objective standard based on Gregory's actual knowledge of the facts at the time of Julian's arrest. Gregory's claim, that no reasonable officer could believe that causing the arrest of the wrong person is against clearly established law, was rejected.

ARGUMENT

There Is No Jurisdiction Under *Johnson v. Jones*

Counsel for Julian Lee wishes to bring to the Court's attention that the Court of Appeals that rendered the decision was without jurisdiction to do so and that this court is without jurisdiction to act on the petition for *certiorari*. Gregory's appeal presented the following issue for review as the sole question for determination by the Court of Appeals: "Whether, in this *Bivens* action alleging Fourth Amendment violations arising out of plaintiff's arrest in a case of mistaken identity, the district court erred in concluding that triable issues of material fact exist that preclude granting summary

judgment to FBI agent Gregory, based on his claim of qualified immunity." (Gregory's opening brief, p. 2). *Johnson v. Jones*, 515 U.S. 304 (1995), which holds that a defendant entitled to invoke a qualified immunity defense may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial compels that conclusion that the Court of Appeals was without jurisdiction to determine Gregory's interlocutory appeal pursuant to 28 U.S.C. § 1291.

Gregory may seek this Court's review by arguing that in rendering its decision, the Court of Appeals ruled on an issue of law that is now appropriate for review on *certiorari*. Given the single issue, however, as presented to the Court of Appeals by Gregory, the Court of Appeals was without jurisdiction *ab initio*.

The factual statement upon which Gregory bases his petition argues the facts in the light most favorable to him. He omits critical facts adverse to his petition and colors others in a misleading way. For example, he says, "At the same time, FBI records indicated that respondent's brother, Robert Lee, ***might*** have used 'Christopher Lee' as an alias." (Pet. 3). There is no "might" in the evidence. The state prosecutor wrote that the information received "*is* that subject ***has changed*** his name to Christopher Lee, d.o.b. 3/7/67 . . . " (App. 33). The FBI agent swore before the magistrate that "Robert Q. Lee ***has changed*** his name to Christopher Lee. . . . " (App. 38). The magistrate judge issued a federal arrest warrant for "Robert Q. Lee, a/k/a Christopher Lee" based on the outstanding complaint against Robert Q. Lee, a/k/a Christopher Lee (App. 35). Gregory asserts that "the social security number, date of birth, race and gender

listed on the warrant were all exact matches for respondent," (Pet. 3) but fails to disclose that Gregory knew that Robert Lee had used the respondent's date of birth and social security number. (C.A.E.R. 56, 117-119, 289).

Gregory's lawyer on appeal tells the court "one factor beyond the matching social security number and birthday pointed decisively toward the conclusion that respondent and not his brother was the person sought by Florida authorities. The FBI description of respondent's brother indicated that he had multiple identifying marks, including scars on his neck and thigh and a tattoo on his left forearm. (C.A.E.R. 85). The Florida warrant's 'scars or tattoos' line did not list any identifying marks. *Id.* at 83." (Pet. 4)

Gregory's petition does not reveal that this "decisive" factor was never mentioned by Gregory in his affidavit, nor at any time during his depositions; that there is no evidence Gregory ever read or even knew of any issue concerning "scars or tattoos" anywhere in the record; that Gregory *never mentioned* this "decisive" fact in any pleading filed in the district court, including his two motions for summary judgment. Nor does Gregory reveal that this "decisive" fact was never presented to the Court of Appeals in any briefs nor in his petition for rehearing *en banc*. The fact was apparently discovered during the preparation of his *certiorari* petition. It now forms a "decisive" part of the basis for his argument.

In these instances and throughout his factual presentation, Gregory has relentlessly violated the rule requiring that the issue of qualified immunity be determined on the basis of facts in the light most favorable to the party claiming the violation; that on appeal, the facts must be

taken in the light most favorable to the non-moving party. He complains that: "In answering that question, the Ninth Circuit did not identify any dispute about the evidence before Agent Gregory – *i.e.*, what agent Gregory saw and heard." (Pet. 7). Of course this is true. Gregory's right to bring an interlocutory appeal requires that the question on the appeal be one presenting "neat abstract issues of law" in which "purely legal matters are at issue." *Johnson v. Jones*, 514 U.S. 304, 316-317 (1995). Gregory's argument, as he presses it here, is an attempt to appeal the district court's order, on issues of fact. Gregory so distorts the factual record as the basis for his legal argument that, after complaining at length that the Court of Appeals has improperly smuggled subjectivity back into Fourth Amendment qualified immunity analysis, he is moved to assert, "The evidence, moreover, shows that agent Gregory *subjectively* believed respondent was named in the Florida warrant." (Pet. 26).

Gregory's petition, to be sure, repeatedly attempts to trick out a legal issue. This he does by constantly inserting his parenthetic rephrasing of the Circuit Court's actual holding, *e.g.*: " . . . by asserting that agent Gregory actually knew" – *i.e.*, that Gregory subjectively concluded from the evidence before him . . . (Pet. 9); and . . . alleging that the officer effected the seizure knowingly – *i.e.*, after subjectively concluding that the suspect was innocent." (Pet. 11). Gregory's argument is premised on assertions of disputed facts. He faults the Ninth Circuit for failing to ask, as an objective matter, whether the disputed facts he posits would provide an objectively reasonable basis for an arrest. (Pet. 13). Although Gregory does not formally label his petition as one which raises the issue of whether the pretrial record sets forth a "genuine" issue of fact for trial,

his petition has done so in substance, under the guise of seeking resolution of a legal question. *Johnson* makes clear that there is no appellate jurisdiction for an interlocutory appeal of an order denying qualified immunity insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue of fact for trial. *Johnson*, *supra*, at 309, 320. The unanimous court in *Johnson* described the harm which promiscuous litigation of interlocutory appeals can cause, including delay and wasted, unnecessary work by appellate courts. *Id.* at 309. The Court noted that questions about whether or not a record demonstrates a "genuine" issue of fact for trial, if appealable, can consume inordinate amounts of appellate time. *Id.* at 316. The *Johnson* Court held:

> We recognize that, whether a district court's denial of summary judgment amounts to (a) a determination about preexisting "clearly established" law, or (b) a determination about "genuine" issues of fact for trial, it still forces public official to trial. See Brief for Petitioners 11-16. And to that extent, it threatens to undercut the very policy (protecting public officials from lawsuits that (the *Mitchell* Court held) militates in favor of immediate appeals. Nonetheless, the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the extension of *Mitchell* to encompass appeals from orders of the sort before us.

515 U.S. at 317-318.

Gregory's appeal, albeit nominally one which states a legal question for review, in substance is so intertwined with his disputed factual submission that it requires application of the *Johnson* rule. Gregory's legal question, and his petition as presented, is merely a *sub rosa* attempt to obtain appellate review of factual issues by this Court,

which should not be forced into sitting as a district court judge to parse disputed submissions of fact or asked to determine a "legal" issue in a fact-bound, fact-based case when the facts are in dispute. Even if Gregory's petition presents a valid legal question for which review under 28 U.S.C. § 1291 would be appropriate, by relying, as he does, on disputed factual submissions, by slanting the record in the light ***most favorable*** to him, and by relying on factual arguments that were neither raised in the district court nor considered or relied upon by the Court of Appeals (*e.g.*, the issue of scars and tattoos), Gregory has run head-on into *Johnson*'s policy. He has submitted, at best, a legal issue whose resolution will require the Court to deal *in extenso* with disputed factual issues, a problem he has caused by the improper factual submission in his petition. The Court should deny his petition for lack of jurisdiction.

An Examination Of Gregory's Knowledge Is Critical To Determine The Reasonableness Of His Conduct

Gregory's semantic attempt to convert the inquiry into Gregory's knowledge of relevant fact into a proscribed inquiry into motive must fail. While intent or motive are ordinarily not relevant to Fourth Amendment analyses, the officer's knowledge of facts is critical to a determination of the objective reasonableness of his conduct. Whether an arrest is constitutionally valid depends on whether, at the time the arrest is made, the officers have "facts and circumstances ***within their knowledge and of which they had reasonably trustworthy information***" sufficient to warrant "a prudent man in believing that the person to be arrested had committed or was committing an offense." (emphasis added) *Beck v. Ohio*, 379 U.S. 89, 91

(1964), citing *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949); *Henry v. United States*, 361 U.S. 98, 102 (1959); See also *Saucier v. Katz*, *supra*, at 207; *Hunter v. Bryant*, *supra*, at 228. This Court has consistently held that examination of the officer's knowledge is the *sine qua non* to determine probable cause: "Whether probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146 (2004), citing *Maryland v. Pringle*, 540 U.S. 366, 171 (2003). To assess whether probable cause exists, one must ask whether the facts actually known to the officer are sufficient to constitute probable cause. The Fourth Amendment inquiry is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting him. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

The Court's qualified immunity jurisprudence, while it eschews inquiry into motive, requires an analysis of what the officer actually knew:

> It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.

Anderson v. Creighton, 483 U.S. 635, 641 (1987).

The question of what the officer knew permits an officer to explain that he reasonably believed something which turned out to be wrong. Gregory relies on the principle that "when the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the

second party is a valid arrest." *Hill v. California*, *supra*, at 802.

If the officer reasonably believes something which turns out to be mistaken, he is entitled to qualified immunity. The "objective reasonableness" standard gives ample room for mistaken judgments *Malley v. Briggs*, 475 U.S. 335, 343 (1986). To determine whether a judgment is based on a reasonable mistake, the question must be asked as to what the officer reasonably believed. Thus, the inquiry into whether an officer acted reasonably requires a determination of what was in the official's mind; *i.e.*, what did he know, what did she believe? Then the question becomes whether the officer acted in an objectively reasonable way based on that knowledge. A blanket condemnation of inquiry into what the official had in his mind, as a probing into alleged "subjective belief," misses the mark. The fact is, before the court can judge the objective reasonableness of an officer's action, it must make an inquiry into what was in the officer's mind – what were the facts and circumstances as he or she reasonably believed them to be. This Court's cases do hold that an officer's intent or motive does not invalidate an action which is objectively reasonable, based on the facts and reasonable beliefs and inferences in that officer's mind. One "subjective" inquiry is forbidden: what was the private motive or intent? Another "subjective" inquiry is mandated under *Beck v. Ohio*: what did the officer know or reasonably believe? The determination of objective reasonableness and hence, of qualified immunity starts with this question which, of necessity, requires evidence of what the officer ***believes*** the facts to be.

Gregory's Conduct, In Light Of His Knowledge, Was Unreasonable

The legal question, based on a proper rendition of facts, is whether, in light of his actual knowledge of the facts, Gregory's actions in causing state officers to arrest Mr. Lee and his failure to disclose to the arresting officer the relevant facts of which he had knowledge, were reasonable. Gregory had actual knowledge that (1) Julian Christopher Lee was 6'3" and weighed 270 pounds; (2) Robert Q. Lee, Julian's brother, was a fugitive who had changed his name to Christopher Lee, and had misappropriated Julian's date of birth and social security number; (3) in 1994, Robert Lee was described as being six feet tall and weighing 180 pounds; (4) in his career Gregory had never seen a discrepancy between a warrant description and the subject to be greater than 30 to 40 pounds; (5) Julian Lee had no previous criminal record; (6) a witness had stated that Julian Lee's physical characteristics did not fit the warrant description, and the same witness, reviewing a photograph of Robert Q. Lee a/k/a Christopher Lee, had stated that the person depicted was ***not*** respondent Julian Lee; (7) the federal complaint and affidavit, and the warrant for the fugitive, were for Robert Q. Lee, a/k/a Christopher Lee; and (8) FBI records showed that there was a possibility that Robert Q. Lee had lived in the Southeastern United States, but there was no evidence that Julian Lee had ever been in or lived in Dade County, Florida, from where the state warrant issued.

Having actual knowledge of these facts, Gregory then obtained a copy of the Florida State warrant for "Christopher Lee," called local California authorities, and represented unequivocally that Julian Lee was the subject of the Florida warrant, asking that he be notified when they

arrested Mr. Lee. Gregory failed to disclose to the state official that there were significant discrepancies between the subject of the warrant and Julian Lee and that the fugitive he was seeking had assumed Mr. Lee's identity, including his middle name, date of birth and social security number. Gregory even failed to tell the state officers that there might be some question or issue that the person he told them was the one to be arrested on the Florida warrant might not be the right one. In reliance on Gregory's representation, the state officials then arrested Mr. Lee, which they assert they would never have done, had Gregory disclosed the facts. The deputies ignored Julian Lee's protestations of innocence at the time of his arrest. When Julian Lee explained to Gregory that his brother Robert has assumed Julian's identity and that Julian was grossly dissimilar to the suspect described in the Florida warrant (all of which Gregory already knew to be true), Gregory informed neither the California deputies nor the Florida officials of any of the facts, leaving Mr. Lee to be held in custody and extradited.

Gregory's conduct in this case was patently unreasonable. If the officers in *Baker v. McCollan*, 443 U.S. 137 (1979) had known when they arrested Linnie Baker that his brother Leonard had procured a duplicate license, and had assumed Linnie's identity, they would never have arrested him. When the jailer discovered that Linnie's brother had assumed Linnie's identity, he immediately released Linnie Baker from custody.

In *Hill v. California*, *supra*, the Court was clear that the officers made a reasonable mistake in arresting the wrong person. Gregory's defense, that he should not be subject to suit because he made a reasonable mistake, is meritless.

There Is No Actual Conflict Among The Circuits

Gregory contends that the First Circuit's decisions in *Floyd v. Farrell*, 765 F.2d 1 (1985) and *Brady v. Dill*, 187 F.3d 104 (1999) conflict with the Ninth Circuit's holding in this case.

He is wrong. *Floyd v. Farrell* held that:

> Probable cause exists when facts and circumstances ***within the arresting officer's knowledge*** and of which he had "reasonably trustworthy information" warrant a reasonable belief that the defendant is committing or has committed a crime . . . 705 F.2d 1, 5 (emphasis added).
>
> The Harlow standard requires that we make an objective analysis of the reasonableness of conduct in light of the facts ***actually known*** to the officer and not consider the officer's motives for conduct to be considered in evaluating a qualified immunity defense. 705 F.2d 1, 6 (emphasis added).

This decision holds:

> Allegations of ulterior motives cannot invalidate police conduct that is justified by probable cause. Whren v. United States, 517 U.S. 806, 811-15 (1996). Thus, if Gregory's motive in causing Julian's arrest was to squeeze Julian for information about Robert, Whren does render such motive irrelevant. However, Gregory's contention ignores the fact that his conduct must be "objectively reasonable in light of the facts and circumstances confronting him without regard for [his] underlying intent or motivation. Graham v. Connor, 490 U.S. 386, 397 (1989) (emphasis added). Gregory's actions are not impugned because of

> his motive but because of his claimed knowledge that Julian was not the person named in the Florida arrest warrant.
>
> Julian contends that in light of the facts and circumstances confronting Gregory, Gregory actually knew that the Florida warrant applied not to him but to Robert. The district court found the evidence presented a genuine issue of material fact as to whether Gregory actually knew that the warrant did not apply to Julian. We may not review that determination. We may not review that determination. *Mendocino Envtl Ctr.*, 192 F.2d at 1291. Gregory's contention that his **actual knowledge** should be ignored is completely without merit. (Pet. App. 7a).

Farrell requires that the analysis be based on what is "actually known". This case states that the Court must look to material facts within the officer's "actual knowledge". Gregory may object to the Court of Appeals' application of the legal standard to the facts of this case, but the legal standard in *Farrell* is the same as the standard here. There is no conflict.

Brady v. Dill is simply inapposite to the instant case. Brady took pains to note:

> We emphasize that we are dealing here with a situation in which the troopers arrested and took into custody the individual who was named in a ***facially valid warrant***. If the police were to mis-execute a warrant, i.e., if they were to arrest someone ***other than the person named in the warrant because of mistaken identities, a different case would arise***.

187 F.3d 104, 115 n.10 (emphasis added).

The Law Provides Ample Protection For Officers Who Arrest The Wrong Person, Acting Reasonably But By Mistake

Gregory's lament that this case presents a future peril for law enforcement officers who will be subject to attack by clever plaintiffs' lawyers is unfounded. This Court's jurisprudence provides ample protection for officers who effect mistaken arrests. The two-party analysis of *Saucier v. Katz*, *supra*, coupled with the protection of *Anderson v. Creighton*, *supra*, insure that officers who arrest the wrong person are immune from suit, if they act reasonably, based upon the knowledge they have at the time of the arrest. The "objective reasonableness" standard gives ample room for mistaken judgments. *Malley v. Briggs*, 475 U.S. 335, 343 (1986). The requirement that the assessment of qualified immunity be based upon the officer's actual knowledge is no threat to law enforcement. By focusing on what the officer knew at the time, it allows ample room for reasonable mistake. It will insure that qualified immunity will protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, at 341.

The standard also permits the innocent injured to seek redress from those few who, like Gregory, act in a clever but unconstitutional way.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JULIAN C. LEE, an individual, Plaintiff, v. JAKE GREGORY, UNITED STATES OF AMERICA, and DOES 1 through 10, inclusive, Defendants.	CASE NO. 01CV0739-K(RBB) **PLAINTIFF'S FIRST AMENDED COMPLAINT FOR:** (1) *Bivens* Action (2) Unruh Act (3) False Arrest/Imprisonment (4) Malicious Prosecution (5) Abuse of Process (6) Battery (7) Intentional Infliction of Emotional Distress (8) Negligence (9) Negligent Infliction of Emotional Distress (10) Negligent Supervision and Training (11) Negligent Hiring and Retention **JURY DEMAND IS HEREBY MADE**

COMES NOW, Plaintiff JULIAN C. LEE, by and through his attorneys of record, Law Offices of Eugene G. Iredale, by Eugene G. Iredale, Esq. and Law Offices of Douglas S. Gilliland, by Douglas S. Gilliland, Esq. and allege and complain as follows:

I.

GENERAL ALLEGATIONS

1. Jurisdiction is proper in the United States District Court for the Southern District of California pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1346(b)(1), *et. seq.* Venue is proper because at all times relevant hereto, all of the acts or omissions giving rise to the liability of these defendants occurred in San Diego County, California.

2. Plaintiff Julian C. Lee's claim under the Federal Tort Claims Act was timely filed on October 20, 2000 and was denied on April 24, 2001 by the United States Department of Justice – Federal Bureau of Investigation by the letter attached hereto as Exhibit 1 and incorporated herein by reference, thereby satisfying the Federal Tort Claims Act claim form requirements.

3. At all times relevant to this complaint, Plaintiff JULIAN C. LEE was an individual residing in San Diego County, California.

4. At all times relevant to this complaint, the Federal Bureau of Investigation was a federal agency of defendant UNITED STATES OF AMERICA and was operating in San Diego County, California through, in part, its agent Defendant JAKE GREGORY.

5. At all times relevant to this complaint, Defendant JAKE GREGORY was an individual employed by the Federal Bureau of Investigation, and was at all times hereto working within the course and scope of that employment and the acts and/or omissions of Defendant JAKE GREGORY, intentional or otherwise, were endorsed, ratified and approved by Defendant UNITED STATES.

6. Plaintiff LEE is truly ignorant of the true names and capacities of DOES 1 through 10, inclusive, and will amend this complaint once their identities have been ascertained as well as the facts giving rise to their liability. These defendants were agents, servants and employees of each other or of the other named defendants and were acting at all times within the full course and scope of their agency and employment, with the full knowledge and consent, either expressed or implied, of their principal and/or employer and each of the other named defendants and each of the defendants approved or ratified the actions of the other defendants, thereby making the currently named defendants herein liable for the acts and/or omissions of their agents, servants and/or employees.

II.

FACTS

Plaintiff, JULIAN C. LEE hereby realleges paragraphs 1 through 6 of this Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

7. Plaintiff JULIAN C. LEE was born on March 7, 1967, at Fort Bragg in Fayetteville, North Carolina while Mr. Lee's father was in the Army. After his honorable discharge, Plaintiff JULIAN C. LEE's father raised the family in New Jersey where he was a Willingsborough, New Jersey police officer.

8. After high school, Plaintiff JULIAN C. LEE joined the United Stated Marine Corps. Plaintiff JULIAN C. LEE graduated in the top of his class and became a weapons instructor in Quantico, Virginia. At Quantico, Plaintiff

JULIAN C. LEE taught classes in weapons and static displays to FBI Agents, DEA Agents and officers from every branch of the armed services.

9. When Desert Storm began, Plaintiff JULIAN C. LEE was transferred to Camp Pendleton where he was a section leader in a weapons company. His unit was transferred to Pakistan where it was involved Desert Storm's Desert Shield strategy and "island hopped," freeing allied prisoners of war.

10. After his military service, Plaintiff JULIAN C. LEE returned to California to begin his civilian life. Plaintiff JULIAN C. LEE worked as a foreman with the San Diego Gas and Electric Company and later for Continental Central Credit. When his father had a stroke, Plaintiff JULIAN C. LEE went into commercial fishing in Alaska and worked 7 days a week so he could help pay his father's medical bills and help buy his parents a house that would accommodate his father's wheelchair.

11. After helping to buy his parents a house, Plaintiff JULIAN C. LEE moved back to California. In July of 1998, he resumed work in the collection industry working for Household Automotive Finance. Plaintiff JULIAN C. LEE has worked with Household Automotive Finance continually since July of 1998 (and sends his parents $500.00 every month). Plaintiff JULIAN C. LEE is an impressive, upstanding citizen. He has never been in trouble with the law.

12. Plaintiff JULIAN C. LEE has a brother named Robert Lee. Robert also goes by the name of Razul. Robert is a fugitive and is wanted on robbery and assault charges. He has also been the subject of a television episode on America's Most Wanted. Robert is estranged from his

family and they have no idea where Robert lives. They have not heard from Robert nor seen him in many years.

13. Over the years, Robert has used many aliases. In the past, he has used Plaintiff JULIAN C. LEE's name and social security number in several states and this was well known to the FBI. For years, the FBI has routinely checked with Plaintiff JULIAN C. LEE's parents to see if they have heard from Robert.

14. In July 1998, an FBI agent, Defendant JAKE GREGORY, visited one of Plaintiff JULIAN C. LEE's old roommates, Grace Kessler. Defendant JAKE GREGORY said his investigation had nothing to do with Plaintiff JULIAN C. LEE. He said he just wanted to ask Plaintiff JULIAN C. LEE some questions about his brother "Robert aka Razul."

15. A few months later, an FBI agent, Defendant JAKE GREGORY, contacted Plaintiff JULIAN C. LEE's old girlfriend Jana Dubraveak. Again the agent said the inquiry was not about Plaintiff JULIAN C. LEE. Defendant JAKE GREGORY was inquiring about "Robert aka Razul."

16. In April, 2000, an FBI agent, Defendant JAKE GREGORY, contacted one of Plaintiff JULIAN C. LEE's old roommates named J.B. and asked him to come into his Carlsbad office to answer some questions. In the office, Defendant JAKE GREGORY showed J.B. a picture of Robert Lee. J.B. said he had never seen Robert Lee before.

17. On April 28, 2000, FBI agent Defendant JAKE GREGORY came to Plaintiff JULIAN C. LEE's home in Encinitas. Plaintiff JULIAN C. LEE was at work. Defendant JAKE GREGORY spoke with Plaintiff JULIAN C.

LEE's girlfriend's brother Bryan Ingraham. Defendant JAKE GREGORY told Mr. Ingraham that his interview had nothing to do with Plaintiff JULIAN C. LEE. Defendant JAKE GREGORY left a business card with a written note asking Plaintiff JULIAN C. LEE to call Defendant JAKE GREGORY on Tuesday. However, Plaintiff JULIAN C. LEE's girlfriend Sarah came home later that day and called Plaintiff JULIAN C. LEE at work and told him about Defendant JAKE GREGORY'S visit.

18. In response, Plaintiff JULIAN C. LEE immediately called Defendant JAKE GREGORY that same day. Plaintiff JULIAN C. LEE explained that he had no idea where his brother was and that he had not spoken to his brother in many years. Plaintiff JULIAN C. LEE also demanded that Defendant JAKE GREGORY stop following him and harassing his friends, old roommates and old girlfriend because he had no idea where his brother was located and neither did his friends.

19. The following week, on Thursday May 4, 2000, a San Diego County Sheriff's deputy was in Plaintiff JULIAN C. LEE's neighborhood questioning a neighbor about Plaintiff JULIAN C. LEE and his brother Robert. Plaintiff JULIAN C. LEE's neighbor assured the deputy that Plaintiff JULIAN C. LEE had lived there for 2-3 years and was a very nice person.

20. Thirty minutes later, Plaintiff JULIAN C. LEE's girlfriend saw a sheriff's car parked in the street by Plaintiff JULIAN C. LEE's house. She went to speak with the deputy in the car named Marco Garmo. Deputy Marco Garmo informed her that he was working with the FBI on the case involving Robert Lee and there was a warrant for his arrest from Florida. Garmo in fact was acting in

concert with, and at the direction of, defendant Jake Gregory. Sarah explained that the FBI had been looking for Plaintiff JULIAN C. LEE's brother for years and they know all about Robert and the fact that he is estranged from the Lee family and Plaintiff JULIAN C. LEE in particular.

21. Sarah immediately called Plaintiff JULIAN C. LEE at work to explain. Plaintiff JULIAN C. LEE then called deputy Marco Garmo on Garmo's cellular telephone. Plaintiff JULIAN C. LEE explained to deputy Marco Garmo that he had no idea where his brother was and that he had not spoken to him nor heard from him in years. Plaintiff JULIAN C. LEE thought that cleared up the situation.

22. Plaintiff JULIAN C. LEE came home from work that same day, Thursday May 4, 2000, and had dinner with Sarah. That evening he went out to buy some cat food at Ralphs. As he drove to Ralphs, he noticed two sheriff's cars following him. Shortly before he pulled into Ralphs parking lot, Plaintiff JULIAN C. LEE was surrounded by several sheriff's cars and ordered out of his car at gunpoint. Deputy Marco Garmo was one of the officers present. The officers told Plaintiff JULIAN C. LEE that they were arresting him on the warrant for his brother in Florida. While acting as a result of a concerted agreement with Defendant JAKE GREGORY, they placed him under arrest and took him to the Encinitas Sheriff's station.

23. When Plaintiff JULIAN C. LEE arrived in handcuffs, Defendant JAKE GREGORY was at the station waiting for Plaintiff JULIAN C. LEE. Defendant JAKE GREGORY demanded that Plaintiff JULIAN C. LEE give him information on his brother Robert. Defendant JAKE

GREGORY said he would be able to clear up the whole "Florida situation" if Plaintiff JULIAN C. LEE gave him information about his brother Robert. Plaintiff JULIAN C. LEE was astonished that he was being held under a warrant relating to charges against his brother Robert, and told Defendant JAKE GREGORY that he had no idea where his brother was and that he had not heard from him nor spoken to him in years. Defendant JAKE GREGORY replied "Have a nice trip to Florida" and walked out of the room.

24. Plaintiff JULIAN C. LEE was transferred to the Vista Jailhouse. Thereafter, he was moved to the downtown San Diego Jail.

25. Plaintiff JULIAN C. LEE was held in custody under a $35,000.00 bail. He was not able to make bail until May 8, 2000. On May 8, 2000, extradition papers were filed to begin Plaintiff JULIAN C. LEE's extradition to Dade County, Florida for the crime committed by his brother in Florida. On May 9, 2000, he was formally charged in San Diego under California Penal Code section 1551.1 for being a fugitive from justice regarding the crime his brother Robert committed in Florida. Thereafter, Plaintiff JULIAN C. LEE, through his friends, was able to hire an attorney who contacted the San Diego District Attorney's office to inform them of the true facts regarding Plaintiff JULIAN C. LEE to stop the extradition to Dade County, Florida. Plaintiff JULIAN C. LEE was freed and the extradition case was dismissed by the San Diego District Attorney's office.

III.

FIRST CAUSE OF ACTION

Violation of Constitutional Rights

by Federal Officer: *Bivens* Action

[Against Jake Gregory and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 25 of this Complaint and incorporates the same by reference as if there paragraphs were fully set forth herein.

26. This cause of action is based upon *Bivens v. Six Unknown Federal Narotic Agents* 403 U.S. 388 (1971). Defendant Jake Gregory deprived Plaintiff JULIAN C. LEE of the following rights under the United States Constitution:

1. Julian Lee's First Amendment right to speak as he felt appropriate to government agents without threat of vindictive government reprisal or retaliation.

2. Julian Lee's Fourth Amendment right to be free of unreasonable searches and seizures and to be free of arrests without probable cause.

3. Julian Lee's Fifth Amendment right to be free from deprivation of liberty without due process of law.

4. Julian Lee's Eighth Amendment right to be free of cruel and unusual punishment.

The arrest and detention was done in violation of due process; it was effected upon a person Gregory knew to be innocent as a way of inflicting punishment on Mr. Lee which was cruel and unusual. The knowing infliction of

pain upon a person known to be innocent is cruel and unusual punishment and in violation of the due process clause of the Fifth Amendment. Among other things, by causing the arrest and continued detention of Julian Lee defendants Gregory arrested him without probable cause, in an unreasonable manner under circumstances that would leave a reasonable person under the same circumstances to believe that no probable cause existed to arrest Julian C. Lee. The arrest and continued detention was caused by Gregory, to retaliate against Julian C. Lee for what Mr. Lee has said to Gregory in enunciating his complaints with Gregory's action, which comments were protected by the First Amendment. The arrest and detention was also to punish Mr. Lee for what defendant Jake Gregory perceived as a lack of cooperation by Mr. Julian Lee.

27. Defendants Gregory deprived Plaintiff JULIAN C. LEE of his rights alleged above under the United States Constitution to be free from unlawful and unreasonable search and seizures, to due process of law and to be free from the infliction of cruel and unusual punishment by implementing or executing a policy statement, ordinance, regulation, decision, custom or usage that permitted its employees and agents to arrest Plaintiff JULIAN C. LEE under these circumstances without probable cause with the intent to deprive plaintiff of the rights alleged herein. Plaintiff JULIAN C. LEE's right to be free from any violence, or intimidation through the threat of violence, committed against him because of his race, color, ancestry, or national origin, was violated by defendant because Plaintiff JULIAN C. LEE was battered, falsely accused, falsely arrested, wrongfully incarcerated, falsely imprisoned, wrongfully prosecuted, and held up to public shame

and obloquy. His rights under the United States Constitution were further violated, in particular, the right to be free from being compelled to speak to a law enforcement official, the right of privacy, the right to be free from unlawful searches and seizures, the right to be free from the imposition of punishment without due process of law, the right to be free from cruel and unusual punishment and the right to due process of law.

28. The conduct alleged herein caused Plaintiff JULIAN C. LEE to be deprived of his civil rights that are protected under the United States Constitution which has also legally, proximately, foreseeably and actually caused Plaintiff JULIAN C. LEE to suffer emotional distress, pain and suffering, damage to reputation and further damages according to proof at the time of trial.

29. The conduct alleged herein also amounts to oppression, fraud or malice within the meaning of Civil Code Section 3294; justifying the award of exemplary damages against defendant Gregory in an amount according to proof at the time of trial in order to deter the defendant from engaging in similar conduct and to make an example by way of monetary punishment. Plaintiff LEE is also entitled to attorney fees and costs of suit herein.

IV.

SECOND CAUSE OF ACTION

California Civil Rights Violation – Unruh Act

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 29 of this Complaint and incorporates the same

by reference as if these paragraphs were fully set forth herein.

30. All persons within the State of California have the right to be free from any violence, or intimidation by threat of violence, committed against them because of their race, color, ancestry and/or national origin. This right is guaranteed by the Unruh Civil Rights Act codified at California Civil Code section 51, et seq.

31. Julian C. Lee is an African American. Plaintiff JULIAN C. LEE's right to be free from any violence, or intimidation through the threat of violence, committed against him because of his race, color, ancestry, or national origin, was violated by defendants because Plaintiff JULIAN C. LEE was battered, falsely accused, falsely arrested, wrongfully incarcerated, falsely imprisoned, wrongfully prosecuted, held up to public shame and obloquy. His rights under the United States Constitution and California Constitution were further violated, in particular, the right to be free from being compelled to speak to a law enforcement official, the right of privacy, the right to be free from unlawful searches and seizures, the right to be free from the imposition of punishment without due process of law, the right to be free from cruel and unusual punishment and the right to due process of law.

32. Due to the violation of Plaintiff JULIAN C. LEE's rights by all defendants, Plaintiff JULIAN C. LEE suffered economic damages and non-economic damages, including, but not limited to, emotional distress, pain and suffering, fear and humiliation caused by the acts complained of herein according to proof at the time of trial.

33. Plaintiff JULIAN C. LEE is also entitled to the statutory civil penalties, exemplary damages and attorneys' fees and costs of suit incurred herein.

V.

THIRD CAUSE OF ACTION

False Arrest/Imprisonment

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 33 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

34. Defendants intentionally and unlawfully exercised force or the express or implied threat of force to restrain, detain or confine Plaintiff JULIAN C. LEE.

35. The restraint, detention or confinement compelled Plaintiff JULIAN C. LEE to stay or go somewhere for some appreciable time.

36. Plaintiff JULIAN C. LEE was unlawfully arrested and taken into custody.

37. The Defendants authorized, encouraged, directed or assisted an officer in either doing an unlawful act or procuring without proper process, Plaintiff JULIAN C. LEE's arrest.

38. The restraint, detention, confinement and arrest caused Plaintiff JULIAN C. LEE to suffer injury, damage, loss or harm according to proof at the time of trial.

39. The conduct of defendants also amounts to oppression, fraud or malice within the meaning of civil code section 3294 et seq. and punitive damages should be assessed against each defendant for the purpose of punishment and for the sake of example.

VI.

FOURTH CAUSE OF ACTION

Malicious Prosecution

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 39 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

40. By engaging in the acts alleged herein, the Defendants initiated or were actively instrumental in procuring the arrest and prosecution in a criminal action.

41. The arrest proceeding and criminal action against Plaintiff JULIAN C. LEE terminated in his favor.

42. The Defendants acted without probable cause in initiating the arrest or procuring the arrest or prosecution of Plaintiff JULIAN C. LEE and they acted with malice.

43. As a direct, proximate and foreseeable result, Plaintiff JULIAN C. LEE suffered damage according to proof at the time of trial.

44. The conduct of Defendants also amounts to oppression, fraud or malice within the meaning of civil code section 3294 et seq. and punitive damages should be

assessed against each defendant for the purpose of punishment and for the sake of example.

VII.

FIFTH CAUSE OF ACTION

Abuse of Process

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 44 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

45. The Defendants abused the process of this court by misusing the power of the court by acts done in the name of the court and under its authority by means of use of a legal process not proper in the conduct of a proceeding for the purpose of perpetrating an injustice.

46. In particular, the Defendants used the legal process in a wrongful manner, not proper in the regular conduct of a proceeding to accomplish a purpose for which it was not designed because [sic] used the Florida warrant to manipulate the process in California and battered, falsely accused, falsely arrested, wrongfully incarcerated, falsely imprisoned, wrongfully prosecuted, held up to public shame and obloquy, and his rights under the United States Constitution were violated, in particular the right to be free from unlawful searches and seizures under the Fourth Amendment, right to be free from the imposition of punishment without due process of law and the right to due process of law under the Fifth Amendment. They also used the process to wrongfully commence extradition against Plaintiff Lee and wrongfully charge him with a

felony for being a fugitive from the law and punish him for what Defendant JAKE GREGORY perceived to be a lack of cooperation.

47. The conduct alleged herein caused Plaintiff JULIAN C. LEE to be deprived of his civil rights that are protected under the United States Constitution which has also legally, proximately, foreseeably and actually caused Plaintiff LEE to suffer emotional distress, pain and suffering, damage to reputation and further damages according to proof at the time of trial.

48. The conduct alleged herein also amounts to oppression, fraud or malice within the meaning of Civil Code Section 3294; justifying the award of exemplary damages against all Defendants in an amount according to proof at the time of trial in order to deter the Defendants from engaging in similar conduct and to make an example by way of monetary punishment.

VIII.

SIXTH CAUSE OF ACTION

Battery

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 48 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

49. The Defendants, and each of them, acted with an intent to cause harmful or offensive contact with the person of Plaintiff JULIAN C. LEE and the intended

harmful or offensive contact did in fact occur. The harmful or offensive contact was not privileged nor consented to.

50. As a result of the Defendants' intent to cause harmful or offensive contact with the person of Plaintiff Lee and the fact that the intended harmful or offensive contact did in fact occur, Plaintiff JULIAN C. LEE suffered damages according to proof at the time of trial. Said damages are currently in excess of the jurisdictional minimum of this court.

51. The conduct of Defendants also amounts to oppression, fraud or malice within the meaning of Civil Code section 3294 et seq. and punitive damages should be assessed against each defendant for the purpose of punishment and for the sake of example.

IX.

SEVENTH CAUSE OF ACTION

Intentional Infliction of Emotional Distress

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 51 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

52. By engaging in the acts alleged herein, the Defendants engaged in outrageous conduct that was intended to cause Plaintiff JULIAN C. LEE to suffer emotional distress or engaged in the conduct with a reckless disregard of the probability of causing Plaintiff JULIAN C. LEE to suffer emotional distress.

53. As a direct, proximate and foreseeable result, Plaintiff JULIAN C. LEE suffered sever emotional distress and the outrageous conduct was the cause of the emotional distress suffered by Plaintiff JULIAN C. LEE.

54. The conduct of Defendants also amounts to oppression, fraud or malice within the meaning of Civil Code section 3294 et seq. and punitive damages should be assessed against each defendant for the purpose of punishment and for the sake of example.

X.

EIGHTH CAUSE OF ACTION

Negligence

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 54 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

55. Defendants had a duty to Plaintiff JULIAN C. LEE to act with ordinary care and prudence so as not to cause harm or injury to another.

56. By engaging in the acts alleged herein, the Defendants failed to act with ordinary care and breached their duty of care owed to Plaintiff JULIAN C. LEE.

57. As a direct, proximate and foreseeable result of the Defendants breach of their duty of care, Plaintiff JULIAN C. LEE suffered damages in an amount according to proof at the time of trial.

XI.

NINTH CAUSE OF ACTION

Negligent Infliction of Emotional Distress

[Against All Defendants and DOES 1 through 10]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 57 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

58. By engaging in the acts alleged herein, the Defendants engaged in negligent conduct and a willful violation of the laws of the State of California causing plaintiff to suffer serious emotional distress.

59. As a direct, proximate and foreseeable result, Plaintiff JULIAN C. LEE suffered serious emotional distress and the outrageous conduct was the cause of the emotional distress suffered by Plaintiff JULIAN C. LEE.

XII.

TENTH CAUSE OF ACTION

Negligent Supervision and Training

[Against The United States]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 59 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

60. The Federal Bureau of Investigation, an agency of defendant United States by employing persons in the capacity of peace officers, has a duty to ensure proper training so that the officers, in performing their duties, do

not violate the federally protected constitutional rights of citizens.

61. The Federal Bureau of Investigation is specifically deficient in training officers with regard to their responsibilities under the Fourth Amendment to have probable cause before executing an arrest warrant, to truthfully disclose all material facts in seeking an arrest warrant and to avoid false or misleading statements when applying for arrest warrants, and to act with due care to insure that no one who is innocent of wrongdoing is falsely arrested.

62. These training deficiencies resulted from the Federal Bureau of Investigation's deliberate indifference to rights guaranteed by the Fourth Amendment rights.

63. The deliberate indifferent training and lack thereof was the cause and moving force behind the violation of Plaintiff JULIAN C. LEE's Fourth Amendment rights.

64. The deliberately indifferent training and lack thereof by the Federal Bureau of Investigation caused Plaintiff JULIAN C. LEE to suffer damages according to proof at the time of trial. As such, Plaintiff JULIAN C. LEE is entitled to attorney fees and punitive damages according to proof.

XIII.

ELEVENTH CAUSE OF ACTION

Negligent Hiring and Retention

[Against The United States]

Plaintiff JULIAN C. LEE hereby realleges paragraphs 1 through 64 of his Complaint and incorporates the same by reference as if these paragraphs were fully set forth herein.

65. The Federal Bureau of Investigation, an agency of defendant United States by employing persons in the capacity of peace officers, has a duty to ensure that its agents are adequately qualified and continue to receive proper and adequate training after they are hired.

66. The Federal Bureau of Investigation was specifically deficient in making sure that Defendant JAKE GREGORY was adequately qualified and continued to receive adequate training with regard to his responsibilities under the Fourth Amendment to have probable cause before obtaining an arrest warrant, to truthfully disclose all material facts in seeking an arrest warrant and to avoid false or misleading statements when applying for arrest warrants, and to act with due care to insure that affidavits submitted are truthful and accurate.

67. These deficiencies in qualifications and retention of Defendant JAKE GREGORY resulted from the Federal Bureau of Investigation's deliberate indifference to rights guaranteed by the Fourth Amendment rights.

68. The deliberate indifference was the cause and moving force behind the violation of Plaintiff JULIAN C. LEE's Fourth Amendment rights.

69. The deliberate indifference by the Federal Bureau of Investigation caused Plaintiff JULIAN C. LEE to suffer damages according to proof at the time of trial. As such, Plaintiff JULIAN C. LEE is entitled to attorney fees and punitive damages according to proof.

WHEREFORE, Plaintiff JULIAN C. LEE prays as follows:

FIRST CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;
2. Special damages according to proof at the time of trial;
3. Any further declaratory relief as this Court deems just;
4. Costs of suit and attorney fees incurred herein; and
5. Exemplary damages.

SECOND CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;
2. Special damages according to proof at the time of trial;
3. Any further declaratory relief as this Court deems just; and
4. Costs of suit and attorney fees incurred herein; and
5. Exemplary damages.

THIRD CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein, and

5. Exemplary damages.

FOURTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

5. Exemplary damages.

FIFTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

5. Exemplary damages.

SIXTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

5. Exemplary damages.

SEVENTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

5. Exemplary damages.

EIGHTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just; and

4. Costs of suit and attorney fees incurred herein.

NINTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

TENTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit and attorney fees incurred herein; and

5. Exemplary damages.

ELEVENTH CAUSE OF ACTION

1. General damages, including emotional distress, according to proof at the time of trial;

2. Special damages according to proof at the time of trial;

3. Any further declaratory relief as this Court deems just;

4. Costs of suit incurred herein; and

5. Exemplary damages.

DATED: July 2, 2001

Law Offices of Eugene G. Iredale

By: /s/ Eugene G. Iredale
Eugene G. Iredale, Esq.

DATED: July 2, 2001

Law Offices of Douglas S. Gilliland

By: /s/ Douglas S. Gilliland
Douglas S. Gilliland, Esq.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JULIAN C. LEE, an individual, Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, a federal agency, JAKE GREGORY, an individual, UNITED STATES, and DOES 1-100, inclusive, Defendants.	CASE NO. 01CV0739-K(RBB) DECLARATION OF JULIAN CHRISTOPHER LEE September 24, 2001 11:00 a.m.

I, JULIAN CHRISTOPHER LEE, being duly sworn, hereby state as follows:

1. I am the plaintiff in this case.

2. I have no criminal record of any kind. I have never been arrested nor charged with any crime, save for the arrest in this case.

3. After high school, I joined the United Stated Marine Corps. I became a weapons instructor in Quantico, Virginia. At Quantico, I taught classes in weapons and static displays to FBI Agents, DEA Agents and officers from every branch of the armed services.

4. When Desert Storm began, I was transferred to Camp Pendleton where I was a section leader in a weapons company. My unit was later transferred to the Gulf

where it was involved in Desert Storm's Desert Shield strategy.

5. After my military service, I returned to California to resume civilian life. I worked as a foreman with the San Diego Gas and Electric Company and later for Continental Central Credit. When my father had a stroke, I went into commercial fishing in Alaska and worked so I could help pay my father's medical bills and help buy my parents a house that would accommodate my father's wheelchair.

6. After helping to buy my parents a house, I moved back to California. In July of 1998, I resumed work in the collection industry, working for Household Automotive Finance. I have worked for Household Automotive Finance continuously since July of 1998.

7. I have three brothers and one sister. One of my brothers is named Robert Q. Lee. I have not seen him for a decade. My brother is a fugitive from charges in New Jersey. I became aware several years ago that my brother Robert Q. Lee was using my name and social security number, as well as the names and social security numbers of my brother Kenneth Lee, my other brother Wilmore Lee, as well as that of my cousin Robert McMillan. I became aware of this because these facts had been reported to one of my brothers and one of my cousins by the FBI who informed them that Robert was in fact using our names and social security numbers during the time he was a fugitive. I became aware of this well before I was arrested in May 2000.

8. I have never been to Miami, Florida.

9. At the time of my arrest, in May of 2000, I stood 6' 3" tall and weighed at least 284 pounds. My driver's

license which was issued in March of 2000 reflected my proper height and weight. It was quite apparent to me and to anyone who had seen me that I weighed at least 284 pounds. In fact, my weight at the time I saw and spoke with FBI agent Jake Gregory on May 2000, was over 290 pounds.

10. I became aware in the year 2000 that an FBI agent was asking friends and relatives of mine questions about me. I obtained the telephone number of Mr. Jake Gregory from Brian Ingraham, my girlfriend's brother who had spoken to Mr. Gregory at my home while I was not there. Brian Ingraham related to me that Gregory had requested that I call him.

11. As a result of this request, I telephoned FBI agent Jake Gregory. I identified myself as Julian Christopher Lee. After I identified myself, I asked Jake Gregory if there was any law that required me to speak with him. He replied that there was not. I said to him that I wanted him to stop harassing my friends and to stop harassing me. I told him that I had not seen my brother for many years. Because I was angry, I cursed at him. I then hung up the phone.

12. Approximately a week after my telephone call with Mr. Jake Gregory, I was placed under arrest by the San Diego County Sheriffs. A Sheriff whose name I believe to be Marco Garmo told me that he was working with the FBI in this matter. I told the Sheriffs that I was not the person that they were seeking who was described in the warrant.

13. During the transportation to the Sheriff's station, I saw what I believed to be a copy of the warrant from Florida. In hand writing there were annotations

which were further descriptions of the person named in the warrant. The hand written descriptions that I saw on the warrant included notations that the person had a shaved head, light complexion, weighed approximately 180 pounds, was 6 feet tall and had hazel eyes. These physical attributes all applied to my brother and were clearly not applicable to me. I have never had a shaved head. I wore shoulder length dread locks at the time of my arrest and have had them for several years.

14. FBI Agent Gregory spoke to me in the cell at the Sheriff's station within approximately five minutes of my arrival there. When he first came into the cell to speak with me he said words to the effect of "Are you ready to talk to me now? The last time I talked to you, you had an attitude". He then said "Do you want to go home? Do you want to get out of here tonight? Then tell me where your brother is." I told him "Like I told you on the phone, I don't know where he is." FBI agent Gregory said "If you want to get out of this Florida situation, you better talk to me now about your brother, otherwise you will be staying here in jail." I told him again that I did not know where my brother was and had not seen him for many years.

15. I told Gregory that my brother had been using my name and social security number as well as that of my other brothers, and that our family had learned this information from the FBI itself several years before. I told him that I had never been in Florida, and that I was clearly not the person who was named in the warrant because I was several inches taller, about 100 pounds heavier, had a different hair style, different color eyes and a different complexion. I told Gregory that he could call my job and that they could verify that I had never been to Florida and had been working in San Diego since June

1998, and therefore could not have committed any crime in Florida in December of 1998.

16. I asked Gregory to please check because he was arresting the wrong person. Gregory simply smiled at me and asked me again if I could help him with information about my brother. When I reiterated for the third time that I had no information about my brother Robert, he smiled at me, threw up his hand and said to me "have a nice flight to Florida". He then left.

17. It was clear to me that Agent Gregory was upset and angry because I had previously cursed at him and hung up the phone. It was also clear to me that he was telling me that if I gave him the information he felt I had concerning my brother, he would release me immediately. He did not tell me anything about his willingness to contact Florida authorities to obtain assistance for me in "my" Florida case. Rather, he made it quite clear that he would arrange for me to be released immediately if I gave him the information he was seeking.

18. When I told him that I was not the person named in the warrant from Florida and had never been in Florida, he did not object, protest or state that I was. Rather he smiled and pointed out that my name was Julian Christopher Lee and the Florida warrant was for a person named Julian Christopher Lee and that if I wanted to clear the matter up I had better give him the information he wanted. Throughout the time I spoke with Gregory, he made it clear to me that if I provided the information he wanted I would be released.

DATED: September 10, 2001

/s/ Julian C. Lee
JULIAN CHRISTOPHER LEE

[SEAL]
Gloucester County Prosecutor
P.O. Box 623
Woodbury, New Jersey 08088
(609) 384-5500
FAX (609) 384-8824

[Names Omitted In Printing]

February 6, 1997

Jeremy Frey, U.S. Attorney
District of New Jersey
U.S. Court House
P.O. Box 2098
Camden, New Jersey 08101

Re: State of New Jersey v. Robert Q. Lee
Gloucester County Indictment 93-02-00103
DOB 12/21/65, FBI #50360EA4

Dear Mr. Frey:

This office requests your assistance in locating the above subject. We also request the subject be charged with an unlawful flight to avoid prosecution warrant.

The current information received is that subject has changed his name to Christopher Lee, DOB 3/7/67 and he may be residing with his brother, Alex Fukay, 5675 Old Pascagoula Road, Mobile, Alabama, Phone 334-653-8851.

Mr. Lee is wanted by this office for armed robbery and aggravated assault.

Enclosed you will find our arrest warrant for Mr. Lee and if apprehended our office will extradite.

Thank you for your cooperation in this matter.

Very truly yours,

ANDREW N. YURICK
COUNTY PROSECUTOR

By /s/ N. R. Armstrong
N. Robert Armstrong
Chief of County Investigation

Enclosure
Faxed 2/6/97
CC: FBI Special Agent Paul Murray/Cherry Hill
John C. Porter, Sgt./CCPO Fugitive Unit

United States District Court
District of New Jersey

UNITED STATES OF AMERICA	:	
v.	:	**WARRANT FOR ARREST**
ROBERT Q. LEE a/k/a Christopher Lee	:	**Case Number: 97-2005**

To: The United States Marshal Special Agents of the Federal Bureau of Investigation, and any Authorized United States Officer

YOU ARE HEREBY COMMANDED to arrest ROBERT Q. LEE, a/k/a Christopher Lee and bring him or her forthwith to the nearest magistrate judge to answer a(n)

___ Indictment ___ Information _X_ Complaint
___ Order of Court ___ Violation Notice ___ Probation Violation Petition

charging him or her with (brief description of offense)

Unlawful flight to avoid prosecution (UFAP).

in violation of Title 18, United States Code, Section(s) 1073.

Honorable Joel B. Rosen — United States Magistrate Judge
Name of Issuing Officer — Title of Issuing Officer

/s/ Joel B. Rosen — February 7, 1997 at Camden, NJ
Signature of Issuing Officer — Date and Location

Bail fixed at $ _____ by _____
Name of Judicial Officer

RETURN		
This warrant was received and executed with the arrest of the above-named defendant at _____		
DATE RECEIVED	NAME AND TITLE OF ARRESTING OFFICER	SIGNATURE OF ARRESTING OFFICER
DATE OF ARREST		

United States District Court
District of New Jersey

UNITED STATES OF AMERICA	:	**CRIMINAL COMPLAINT**
v.	:	**Magistrate No. 97-2005**
ROBERT Q. LEE a/k/a Christopher Lee	:	(Filed Feb. 7, 1997)

I, the undersigned complainant being duly sworn state the following is true and correct to the best of my knowledge and belief. In or about April, 1994 in Gloucester County, in the District of New Jersey and elsewhere, defendant did:

knowingly and willfully travel in interstate commerce from the State of New Jersey to the Commonwealth of Alabama with the intent to avoid prosecution for the crimes of Robbery and Aggravated Assault with a Deadly Weapon, which are felon[y] offenses, contrary to New Jersey Statutes Sections 2C:15-1 and 2C:12-1b(2).

In violation of Title 18, United States Code, Section 1073.

I further state that I am a Special Agent with the Federal Bureau of Investigation and that this complaint is based on the following facts:

SEE ATTACHMENT

/s/ William P. Grace
Signature of Complaint
Williams P. Grace
Special Agent, F.B.I.

Sworn to before me and subscribed in my presence,

February 7, 1997	at	Camden, New Jersey
Date		City and State

Honorable Joel B. Rosen United States Magistrate Judge	/s/	Joel B. Rosen
Name & Title of Judicial Officer		Signature of Judicial Officer

---

Attachment

I, William P. Grace, being duly sworn, deposes and says:

1. On or about February 25, 1993, an indictment was handed down by a grand jury sitting in Gloucester County, New Jersey, charging the defendant ROBERT Q. LEE with Robbery and Aggravated Assault with a Deadly Weapon, in violation of N.J.S.A. sections 2C:15-1 and 2C:12-1b(2).

2. On or about April 14, 1994, an arrest warrant was issued by Superior Court Judge Donald A. Smith, Jr., for the arrest of defendant ROBERT Q. LEE for violation of N.J.S.A. sections 2C:15-1 and 2C:12-1b(2). Since that time, the local authorities have been unable to locate the defendant ROBERT Q. LEE in the State of New Jersey.

3. On or about February 6, 1997, our office received information from the Gloucester County Prosecutor's Office that the defendant ROBERT Q. LEE has changed his name to Christopher Lee, and that he may be residing in Mobile, Alabama with family members.

4. The Gloucester County Prosecutor's Office has indicated that if the defendant is apprehended, he will be extradited to the State of New Jersey to face charges.

No. 05-344

IN THE

Supreme Court of the United States

JAKE GREGORY,

Petitioner,

v.

JULIAN C. LEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR PETITIONER

JEFFREY A. LAMKEN
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REPLY FOR PETITIONER

Respondent does not dispute that the Ninth Circuit denied FBI Special Agent Jake Gregory qualified immunity based on allegations about Gregory's state of mind. Instead, respondent defends that reasoning: "[T]he inquiry into whether an officer acted reasonably," respondent states, "requires a determination of *what was in the official's mind*; * * * what did [he] *believe*?" Br. in Opp. 22 (emphasis added); see *ibid.* (court "must make an inquiry into what was in the officer's mind"). Like the courts below, respondent eschews resolving probable cause based solely on *the objective evidence* before the officer—what he saw, read, and heard. Like the courts below, respondent declines to address, for qualified immunity purposes, whether "a reasonable officer" with precisely the "information possessed" by Agent Gregory "*could have* believed" there was cause for respondent's arrest. *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987) (emphasis added).

To respondent and the Ninth Circuit alike, Fourth Amendment reasonableness and qualified immunity instead depend on a *jury's* assessment of the "beliefs and inferences in [Agent Gregory]'s mind." Br. in Opp. 22. Thus, it is of no moment that, as respondent concedes, the Ninth Circuit found no "dispute about the evidence before Agent Gregory—*i.e.*, what [A]gent Gregory saw and heard." Pet. 7; Br. in Opp. 18 ("this is true"). It matters not that that evidence included a facially valid Florida warrant issued in respondent's name, with respondent's Social Security number, date of birth, gender, race, and approximate height. Nor does it matter that the warrant omitted the scars and identifying marks included in every description of respondent's brother. Instead, qualified immunity is unavailable because a juror could find that Agent Gregory subjectively concluded from the evidence—and thus "knew"—that respondent's brother, not respondent, had committed the Florida crimes. Because "[k]nowingly arresting the wrong person" is "self-evidently" unlawful, the Ninth Circuit declared, there must be a trial to "determine whether Gregory knew or did not know he was causing the arrest of the wrong

man." Pet. App. 10a. And the dispositive issue for the jury is whether Gregory in fact "mistakenly[] believed" that respondent was the person sought by Florida authorities, or whether he believed respondent was innocent but "procured [respondent's] arrest" under the warrant nonetheless to "pressur[e] [respondent] to provide information." Pet. App. 22a-23a.

That approach conflicts with this Court's Fourth Amendment and qualified immunity decisions, including *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), which "reject the inquiry into state of mind in favor of a *wholly objective* standard." *Davis* v. *Scherer*, 468 U.S. 183, 191 (1984) (emphasis added); see *Whren* v. *United States*, 517 U.S. 806, 813 (1996) (officer's "state of mind" irrelevant if "the circumstances, viewed objectively," justify the action). It conflicts with the First Circuit's decisions in *Floyd* v. *Farrell*, 765 F.2d 1 (1985), and *Brady* v. *Dill*, 187 F.3d 104 (1999), which make clear that the "objective reasonableness" standard looks to the *facts before* the officer, not allegations about the thoughts the officer had in his mind. It exacerbates disarray on this issue in the federal courts. And it has a profound impact on law enforcement, making qualified immunity nearly impossible to resolve before trial in a growing category of cases. See Pet. 25-27; Br. State Amici 12.

Respondent's brief in opposition offers only a half-hearted effort to address the circuit conflict (Br. in Opp. 25-26) and the issue's importance (*id.* at 26). Instead, respondent devotes much of his argument (*id.* at 15-20) to the unfounded claim that this Court lacks jurisdiction under *Johnson* v. *Jones*, 515 U.S. 304 (1995). We address those arguments in turn.

I. The Ninth Circuit's Decision Conflicts With This Court's And The First Circuit's Precedents

A. Respondent does not dispute that, under the "objective" Fourth Amendment and qualified immunity standards adopted by this Court, the officer's motives are irrelevant. Reasonableness depends on the "facts known" and "information possessed" by the officer. Br. in Opp. 21-22. For Fourth Amendment purposes, the question is "whether the[] historical facts, viewed from the standpoint of an objectively reasonable

police officer, amount to * * * probable cause." *Ornelas* v. *United States*, 517 U.S. 690, 696 (1996). For qualified immunity, the issue is whether "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that probable cause existed; if "officers of reasonable competence could disagree on this issue, immunity [must] be recognized." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Seizing on the need to determine the "facts and circumstances within [the officer's] knowledge," Br. in Opp. 20, 21; see *id.* at 25, 26, respondent urges that courts may "inquir[e] into what was in the officer's mind," the "inferences" he allegedly drew, and thus what the officer "believe[d]." *Id.* at 22, 23. But that conflates knowledge with subjective belief. In the Fourth Amendment and qualified immunity contexts, an officer's "knowledge" consists of the facts the officer observed (and which any officer in his shoes would also have observed), *i.e.*, the "information possessed" by the officer and "the circumstances [he] confronted." *Anderson*, 483 U.S. at 640, 641. The officer's subjective assessments of those facts and his conclusions are precisely the sort of "subjective beliefs" this Court has long deemed "irrelevant." *Id.* at 641; Pet. 14-18.

B. Respondent's and the Ninth Circuit's conflation of "knowledge" with inference and subjective belief squarely conflicts with the First Circuit's decisions in *Floyd* and *Brady*. In *Floyd*, the plaintiff (like respondent here) alleged that the arresting officer had inferred and thus "knew" he was innocent, but arrested him nonetheless. Pet. 19-20. Respondent nowhere disputes that the First Circuit explicitly rejected reliance on the officer's "own evaluation of the facts before him"—including the claim that he "believe[d] that" the plaintiff "did not know the car was stolen." 765 F.2d at 6. Nor does respondent deny that the Ninth Circuit reached the opposite result here, holding that Gregory's alleged belief in respondent's innocence was not only relevant but dispositive.

Nonetheless, respondent urges that *Floyd* is limited to the issue of "motive," and he quotes it as holding that an "objective analysis of the reasonableness of conduct" requires the

court to consider "the facts *actually known* to the officer and not consider *the officer's motives* * * *." Br. in Opp. 25 (some emphasis added). But that "quotation" omits the critical language. In fact, *Floyd* states that courts must look to "the facts actually known to the officer and not consider *the individual officer's subjective assessments* of those facts." 765 F.2d at 6 (emphasis added). The First Circuit thus held that courts may not do precisely what the Ninth Circuit did here—*i.e.*, determine reasonableness by examining the individual officer's subjective "evaluation of the facts before him," rather than examining the objective facts themselves. *Id.* at 6.

Nor does respondent reconcile the Ninth Circuit's decision with *Brady*, *supra*. In *Brady*, as here, the plaintiff was arrested under a warrant issued in his name because his brother had appropriated his identity. See Pet. 21. The plaintiff in *Brady*, like respondent here, claimed that the officers detained him even though they had concluded (and thus "knew") that he was innocent. *Ibid.* But the First Circuit in *Brady*, unlike the Ninth Circuit here, held that allegation to be irrelevant. Assuming the officers "came to believe, with some degree of subjective certainty, that the man they had arrested, though named in the warrant, was innocent of the underlying charge," the court declared, that "is not knowledge, but subjective belief." 187 F.3d at 113. Citing this Court's decision in *Whren*, *supra*, the First Circuit held that allegations about that "kind of subjective belief" are irrelevant. *Ibid.* Thus, under *Brady*, courts evaluating knowledge in the First Circuit are limited to the objectively observable information before the officer—and may not consider, as the Ninth Circuit did here, what the particular officer allegedly inferred from his observations. See also *Tower* v. *Brown*, 326 F.3d 290, 296 (1st Cir. 2003) (we may "not consider the individual officer's subjective assessment").

Respondent asserts that *Brady* is "inapposite" because that decision states, in a footnote, that the result might be different where the plaintiff is not the person actually "named in [the] facially valid warrant." Br. in Opp. 26 (quoting 187 F.3d at 115 n.10). But that does not distinguish *Brady* from this case. No

less than the plaintiff in *Brady*, respondent was the person named in the warrant. Both were identified by "name, date of birth, and Social Security number." 187 F.3d at 106; Pet. App. 4a. It just turns out that in both cases, because of filial identity theft, the warrants had been issued for the wrong brother.

Respondent also ignores the rampant confusion throughout the federal courts. See Pet. 23-25. Respondent thus does not deny that the courts of appeals, see, *e.g.*, *Gay* v. *Wall*, 761 F.2d 175 (4th Cir. 1985); *Sanders* v. *City of Flatwoods*, No. 90-5540, 1991 WL 100588, at *2 (6th Cir. June 11, 1991), and the district courts are in disarray over whether objective reasonableness "take[s] into account the subjective view of the defendant," *e.g.*, *Hebein* v. *Young*, 37 F. Supp. 2d 1035, 1043 (N.D. Ill. 1998), or precludes "speculation" about his "thoughts" and "subjective state of mind," *e.g.*, *Fletcher* v. *Tom Thumb, Inc.*, No. Civ. 99-1680, 2001 WL 893913 (D. Minn. Aug. 7, 2001).

C. The issue, moreover, is important. As the petition (at 25-27) and the thirteen State Amici (at 12-13) explain, the Ninth Circuit's decision effectively prevents qualified immunity from being resolved before trial. Proof at the arrest stage (probable cause) is rarely air tight, and an erroneously arrested individual will almost always be able to point to some discrepancy suggesting that the officer was arresting the "wrong" person. Br. State Amici 12; *Brady*, 187 F.3d at 113 ("descriptive innaccuracies" are "commonplace"). Under the Ninth Circuit's approach, that will always give rise to a triable issue of fact on whether the officer "knew"—*i.e.*, subjectively inferred—that he was arresting an innocent person. *Ibid.* In this case, for example, respondent was arrested under a warrant issued in his name, with his Social Security number, birth date, and approximate height.[1] Yet the Ninth Circuit rejected qualified immunity by finding a "dispute" over whether

[1] Contrary to respondent's assertion, J.B. Kleiman's description of respondent (as "over six feet tall and weigh[ing] more than 200 pounds"), Br. in Opp. 6, 23, did "match" the warrant, which described the suspect as 6' 1" tall and weighing approximately 200 pounds. C.A. E.R. 83.

Gregory "knew" (based largely on a weight discrepancy) that the warrant should have been issued for respondent's brother—even though the warrant omitted the scars and marks that characterized respondent's brother. See Pet. 4.

This Court repeatedly has warned against any approach that "routinely places the question of immunity in the hands of a jury." *Hunter* v. *Bryant*, 502 U.S. 224, 227-228 (1991); see *Saucier* v. *Katz*, 533 U.S. 194, 200-201 (2001) ("[W]e have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation."). If arresting officers confront the "peril" of litigation and trial any time there is a "discrepancy" in the warrant description, "many a criminal will slip away." *Johnson* v. *Miller*, 680 F.2d 39, 41 (7th Cir. 1982). Worse, if evidence that the officer subjectively believed the arrestee was "innocent" is a sufficient basis for burdensome litigation, officers may decline to pursue alternative suspects after arrest for fear that those efforts will become evidence they "knew" the detainee was innocent. It was precisely those sorts of consequences that prompted this Court, in *Harlow*, to reject inquiries into the officer's subjective thoughts and replace them with a wholly objective standard that looks to the information and circumstances before the officer. 457 U.S. at 816-817.

Officers executing facially valid warrants face an ever-increasing risk of suit for false arrest—even when, as here, they arrest the very person named in the warrant. Pet. 28. Indeed, the federal reporters are replete with decisions addressing mistaken arrests resulting from identity theft, and identity theft is on the rise. Confronted by the threat of suit for virtually every arrest, officers may hesitate to execute facially valid warrants—from other jurisdictions or their own—forestalling the sort of decisive action upon which effective law enforcement depends. Pet. 29 & n. 6.

II. This Court Has Jurisdiction Over The Legal Issue Presented By The Petition

Respondent's claim that this Court lacks jurisdiction under *Johnson* v. *Jones*, 515 U.S. 304 (1995), is baseless. As *Johnson*

explains, orders denying qualified immunity are "appealable 'final decisions'" within the meaning of 28 U.S.C. § 1291—so long as "the issue appealed concern[s], not which facts the parties might be able to prove, but, rather, whether or not certain given facts showed a violation of 'clearly established' law." 515 U.S. at 311 (citing *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985)). *Johnson* clarified that officials cannot challenge decisions regarding "which facts a party may, or may not, be able to prove at trial." 515 U.S. at 313; *id.* at 319-320 (whether "the pretrial record sets forth a 'genuine' issue of fact"). But "*Johnson* reaffirmed that summary-judgment determinations are appealable when they resolve a dispute concerning an *'abstract issu[e] of law' relating to qualified immunity*," such as whether "the conduct which the District Court deemed sufficiently supported * * * met the *Harlow* standard of 'objective legal reasonableness.'" *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996) (emphasis added).

Respondent does not deny that the petition presents precisely the sort of "'abstract issu[e] of law' relating to qualified immunity" that can be raised notwithstanding *Johnson*. *Behrens*, 516 U.S. at 313. The petition does not challenge whether "the evidence" was sufficient to "support a finding that particular conduct occurred." *Ibid.* Instead, it presents "an issue of law," Br. in Opp. 16—whether "the lawfulness of a seizure under the Fourth Amendment, and the availability of qualified immunity, may turn on allegations that the officer subjectively inferred * * * —and thus 'knew'—that the arrestee was innocent." Pet. i; Br. in Opp. 18-19. This Court repeatedly has granted review to address similar qualified immunity questions in precisely this procedural context. See, *e.g.*, *Saucier*, 534 U.S. at 196 (whether qualified immunity and Fourth Amendment inquiries merge in excessive force cases); *Anderson*, 483 U.S. at 638-639 ("level of generality" at which "clearly established law" is determined); *Harlow*, 457 U.S. at 816-817 (adopting objective standard for qualified immunity).

While conceding that the question before this Court is within the limits set forth by *Johnson*, respondent urges that

the issue, "as presented to the Court of Appeals," was not. Br. in Opp. 16. But the issue below and the issue here are one and the same. The issue below was not "which facts [respondent would or would] not be able to prove at trial." 515 U.S. at 313. It was whether, "assuming [respondent]'s version of the facts is true—that [Gregory] procured [respondent]'s arrest" after concluding respondent was innocent "so that he could pressure [respondent] into providing information * * * —[Gregory] is still entitled to immunity because * * * a reasonable officer armed with *the facts*" before Gregory, including "an outstanding valid warrant for a suspect matching [respondent]'s name" and other "characteristics, could have believed [the arrest] to be lawful." Gov't C.A. Show Cause Br. 6-7. That was the issue the government briefed.[2] That was the issue respondent addressed.[3] And that was the issue the court of appeals resolved. Pet. App. 6a ("whether, assuming all conflicts in the evidence are resolved in [respondent's]'s favor, Gregory would be entitled to qualified immunity as a matter of law").[4]

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[2] Gov't C.A. Br. 21 (assuming Gregory believed that "the person named in the warrant was not" respondent, that "do[es] not state a violation of the Fourth Amendment in this case, because subjective intent has no role"); *id.* at 27 ("Supreme Court * * * precedent foreclose[s] an examination into an officer's subjective intent").

[3] Respondent characterized the issue as whether "a federal agent enjoy[s] qualified immunity * * * when he intentionally causes the arrest of a citizen he knows" to be innocent, Resp. C.A. Br. 1; addressed the argument that "the District Court erred by considering Agent Gregory's subjective intent," *id.* at 16; and urged that immunity requires "inquiry into the officer's mind," because an officer cannot arrest someone he believes (and thus "knows") to be "the wrong person," *ibid.*

[4] Respondent's sole basis for his contrary assertion is the government's "issue presented" in the court of appeals, which was whether "the district court erred in concluding that triable issues of material fact * * * preclude granting summary judgment * * * on * * * qualified immunity." Br. in Opp. 15-16. But that issue presented merely paraphrases the summary-judgment standard of Fed. R. Civ. P. 56, and asks whether summary judgment should have been granted. It does not ask whether the trial court erred in finding certain disputes to be "genuine," *i.e.*, supported by sufficient evidence on each side. See 515 U.S. at 319-320.

Finally, respondent urges that—although the petition "formally" presents an abstract "legal issue for review," Br. in Opp. 18, 19—there is no jurisdiction because he disagrees with the petition's characterization of certain facts. See Br. in Opp. 18-19. But the "Ninth Circuit did not identify any dispute about the evidence before Agent Gregory—*i.e.*, what [A]gent Gregory saw and heard," as respondent expressly concedes. Br. in Opp. 18 ("this is true"). Respondent, moreover, cites no case to support his claim that a party's purported factual disagreements can deprive a court of jurisdiction over a purely legal qualified immunity issue. The D.C. Circuit had "little trouble" disposing of precisely that contention in *Moore* v. *Hartman*, 388 F.3d 871, 875-876 (2004).[5] The same argument, moreover, was pressed in opposition to the government's petition for a writ of certiorari in *Moore*, Br. in Opp. 21-22, *Hartman* v. *Moore*, No. 04-1495 (May 27, 2005), and this Court granted review nonetheless, 125 S. Ct. 2977 (2005).

In any event, respondent's purported factual disputes are contrived. Respondent argues that the petition should not have asserted that "FBI records indicated that respondent's brother * * * *might* have used" respondent's name "as an alias" because "there is no 'might' in this evidence." Br. in Opp. 16. Characterizations aside, *the facts* are undisputed. At the time Gregory acted, he had before him "a July 1999 FBI bulletin which included 'Christopher Lee' in a list of five names and corresponding Social Security numbers used 'at various locations * * * by various individuals,' adding that '*it is not known* if [respondent's brother] Robert Lee is one of these individuals.'" Pet. 3 (quoting C.A. E.R. 71) (emphasis added). Moreover, even assuming Gregory had unassailable proof that *both* respondent and his brother had used respondent's name and identity, that evidence would not have precluded a reasonable officer from concluding that respondent rather than his

[5] So long as the district court's determinations are respected, "the solution to a disputed record on qualified immunity is the same as in any other summary judgment case"—the facts are viewed "in the light most favorable to the nonmoving party." *Moore*, 388 F.3d at 875-876.

brother had committed the crime described in the Florida warrant.

Indeed, at least one fact pointed decisively to respondent over his brother as the person wanted by Florida authorities—the Florida warrant did not mention scars or identifying marks, while every description of respondent's brother noted his extensive scars and tattoos. Br. in Opp. 17; Pet. 4, 13. Respondent nowhere denies that fact. Instead, respondent complains that, although Gregory "reviewed the warrant," C.A. E.R. 80, he did not *testify* that he relied on the warrant's omission of identifying marks. Br. in Opp. 17.[6] But that underscores the subjective nature of the tests respondent and the Ninth Circuit adopt. In their view, Fourth Amendment reasonableness and qualified immunity turn on the arresting officer's subjective mental processes—what he in fact took into account when he decided to act.[7] Whether the Ninth Circuit erred in adopting that test, or whether the First Circuit erred in rejecting it, *is* the question presented for review.

* * * * *

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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[6] Respondent also urges that "this 'decisive' fact was never presented" to the court of appeals "in any briefs nor in [the] petition for rehearing en banc." Br. in Opp. 17. Not so. See Gov't C.A. Reh'g Pet. 12 ("the Florida warrant * * * omitted any mention of scars, tattoos, or other identifying marks that characterized descriptions of plaintiff's brother").

[7] Respondent's extensive reliance on statements allegedly made by Gregory *after* respondent was arrested (Br. in Opp. 9-11) is likewise misplaced. The question here is whether Gregory violated respondent's rights (clearly established or otherwise) by *causing respondent's arrest*. See, *e.g.*, Pet. App. 6a (whether "clearly established law prohibited [Gregory] from executing a facially valid warrant"). What Gregory allegedly said after the arrest has no bearing on the facts before him when the arrest occurred. Instead, they bear on Gregory's *motive* for making the arrest—precisely the issue that *Harlow* excised from the qualified immunity inquiry. *Floyd*, 765 F.2d at 6. The statements that respondent quotes, moreover, are consistent with Gregory's position that he was offering to help respondent deal with Florida authorities on valid charges if respondent cooperated in locating his fugitive brother.

Respectfully submitted.

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JANUARY 25, 2006

No 05-344.

In the

Supreme Court of the United States

JAKE GREGORY,
Petitioner,

v.

JULIAN C. LEE,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF ALABAMA, CALIFORNIA, COLORADO, DELAWARE, GEORGIA, MARYLAND, MICHIGAN, OHIO, OKLAHOMA, TEXAS, UTAH, VERMONT, AND VIRGINIA, AND THE COMMONWEALTH OF PUERTO RICO AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether the lawfulness of a seizure under the Fourth Amendment, and the availability of qualified immunity, may turn on allegations that the officer subjectively inferred from the information before him - and thus "knew" - that the arrestee was innocent, without regard to whether, objectively assessed, the information supported probable cause or a reasonably competent officer could have so concluded. *See* Pet. at i.

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INTEREST OF AMICI

This is a case about qualified immunity, a doctrine designed to protect public officials against the burdens of civil litigation arising out of their on-the-job conduct. The amici States, whose officers are frequently named as defendants in suits alleging constitutional violations, have a keen interest in ensuring that qualified immunity remains the robust defense it was meant to be. The fact that the present petitioner is a federal officer sued under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), whereas suits against state officers for alleged violations of constitutional rights proceed under 42 U.S.C. §1983, is of no moment; this Court has made clear that qualified immunity applies identically in both contexts. *See Harlow v. Fitzgerald*, 457 U.S. 800, 809, 818 n.30 (1982) (citing *Butz v. Ecomomou*, 438 U.S. 478, 504 (1978)).

STATEMENT OF THE CASE

The petition, of course, provides the necessary detail concerning the facts that underlie the present case. Suffice it to say here that petitioner, FBI Special Agent Jake Gregory, had a hand in executing a Florida arrest warrant against respondent Julian Christopher Lee. The dispute here centers on whether respondent or, alternatively, respondent's brother Robert Q. Lee, was, in fact, the target of the Florida warrant. In many respects, the information contained in the warrant fit respondent to a T. For starters, the name listed in the warrant, "Christopher Lee," was indeed the name respondent was using at the time. In addition, "[t]he Social Security number, date of birth, race, and gender listed on the warrant were all exact matches for respondent." Pet. at 3. Finally, whereas the FBI description of respondent's brother reported that he had multiple identifying marks, including several scars and a tattoo, the warrant's "scars

or tattoos" line was blank. *See id.* at 4. On the other hand, it must be acknowledged, two factors pointed, at least at the margins, away from respondent as the subject of the warrant: whereas the warrant listed "Christopher Lee's" height and weight as 6' 1" and 200 pounds, respectively, respondent's driver's license listed him as two inches taller and 70 pounds lighter. *See id.* at 3.

After it was determined that respondent's arrest pursuant to the Florida warrant had been based on mistaken identity (or more accurately, identity theft), all charges against him were dropped. Respondent nonetheless sued Agent Gregory alleging, among other things, a violation of his Fourth Amendment rights. Agent Gregory sought summary judgment on qualified immunity grounds. Both the district court and the Ninth Circuit, however, denied summary judgment on the basis of respondent's "conten[tion]" that – without respect to whether objective facts gave rise to probable cause to arrest – Agent Gregory "actually knew" that respondent was not the person named in the warrant. App. 8a. As to the underlying constitutional claim, the Ninth Circuit held that "[k]nowingly arresting the wrong person pursuant to a facially valid warrant issued for someone else violates rights guaranteed by the Fourth Amendment" and that "Gregory's contention that his actual knowledge should be ignored" in favor of a focus on objective factors was "completely without merit." App. 8a. Likewise, with respect to qualified immunity, the court of appeals held that "[k]nowingly arresting the wrong person is [a] self-evident wrong because an officer cannot have probable cause to believe the person arrested has committed the crime described in a warrant when he knows that the warrant identifies another person." App. 10a.

REASONS FOR GRANTING THE PETITION

Presently at issue is the Ninth Circuit's singular reliance on Agent Gregory's alleged subjective perceptions – his supposed "knowledge" – to defeat qualified immunity. As we will show, the court's reliance on subjective considerations squarely conflicts with (i) well-reasoned decisions of the First Circuit, (ii) this Court's own precedents clarifying that both probable cause and qualified immunity are governed by purely objective criteria, and (iii) the fundamental public policies underlying the qualified immunity doctrine. Furthermore, the question presented is of tremendous practical importance – most of all, perhaps, to the States and their officers. By making every allegation of subjective "knowledge" a basis for dispensing with immunity and an occasion for trial, the Ninth Circuit's decision "punches a gaping hole in the qualified immunity defense." Pet. at 10.

I. The Ninth Circuit's Reliance on Subjective Considerations To Defeat Qualified Immunity Implicates a Clear Circuit Split.

That the question presented implicates a square circuit split – and has engendered confusion more generally – is clear enough. As the petition convincingly demonstrates, the First and Ninth Circuits have now offered diametrically opposite answers to the very same questions. The First Circuit has consistently held that an officer's subjective beliefs are irrelevant to the probable-cause and qualified-immunity inquiries; all that matters for Fourth Amendment purposes is that the information before the officer, viewed objectively, was sufficient to justify the arrest, and, for qualified-immunity purposes, that a reasonable officer could have thought the information sufficient. *See* Pet. at 19-21 (summarizing *Floyd v. Farrell*, 765 F.2d 1 (1st Cir. 1985), and *Brady v. Dill*,

187 F.3d 104 (1st Cir. 1999)). In particular, the First Circuit has taken pains to clarify that there is a difference for probable-cause and qualified-immunity purposes between true, objective "knowledge" – meaning awareness of a fact or event to which one was a "percipient witness" – and "subjective belief." *Brady*, 187 F.3d at 113. The latter, which refers to the inferences an officer draws in his own mind on the basis of his "own evaluation of the facts before him," is categorically off-limits. *Floyd*, 765 F.2d at 6.

In stark contrast, the Ninth Circuit in this case held – wholly without regard to the nature of the objective information in the arresting officer's possession – that because respondent Lee had "contend[ed]" that Agent Gregory "actually knew" that Lee was not the person named in the arrest warrant, and because "[n]o reasonable officer would believe that he is entitled knowingly to arrest the wrong man pursuant to a facially valid warrant the officer knows was issued for someone else," qualified immunity was inappropriate. App. 9a. Before going further, a brief clarification concerning terminology is in order. There is of course no allegation here that Agent Gregory was a first-hand observer of any of the crimes in question; he could not therefore have "actually kn[own]" in the strict sense that Lee was innocent (or guilty, for that matter). Rather, what the Ninth Circuit casually referred to as Agent Gregory's "knowledge" was, in fact, his supposed "subjective belief" that Lee was not his man. That consideration, however labeled, is the very consideration that the First Circuit ruled out of bounds.

The First and Ninth Circuits' approaches – one focusing entirely on objective facts, the other entirely on subjective perceptions – cannot be reconciled.[1]

II. The Ninth Circuit's Reliance on Subjective Considerations To Defeat Qualified Immunity Squarely Conflicts With This Court's Own Precedent.

What seems equally (if not more) clear to amici is that the Ninth Circuit's subjective-perceptions approach to probable cause and qualified immunity is fundamentally inconsistent with this Court's own established precedent. Because the petition convincingly makes the case on both scores, we provide only a thumbnail sketch here.

A. This Court's Decisions Make Clear That Probable Cause Turns on Objective, Rather Than Subjective, Considerations.

The first step in the qualified-immunity analysis, of course, asks whether "the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The Ninth Circuit here held that it didn't matter whether Gregory "had probable cause to believe that the person named in the facially valid ... warrant was in fact" Lee; rather, the court said, because Lee had "contend[ed]" – without respect to the objective facts bearing on probable cause – that Agent Gregory "actually knew" (*i.e.*, subjectively believed) that Lee was

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[1] Even beyond the clear circuit split that the Ninth Circuit has created (and is apparently committed to maintaining, *see Henshaw v. Daugherty*, No. 04-15619, 125 Fed. Appx. 175, 2005 WL 756105, at *1 (9th Cir. Apr. 4, 2005) (following *Gregory*)), the lower courts seem genuinely confused about the role, if any, that subjective perceptions play in the probable-cause and qualified-immunity analyses. *See* Pet. at 23-25 (cataloguing conflicting decisions from the Fourth and Sixth Circuits and from several district courts).

not the person named in the arrest warrant, summary judgment was inappropriate. App. 8a. Agent Gregory's position that his (imputed) "actual knowledge" had no place in the Fourth Amendment calculus, the court of appeals said, was "completely without merit." *Id.*

The Ninth Circuit's focus on Agent Gregory's subjective beliefs - what the court called his "knowledge" - is irreconcilable with three key tenets of this Court's probable-cause jurisprudence. First, this Court has repeatedly affirmed that probable cause is not just a necessary condition to a valid arrest, but a sufficient condition, as well. *See, e.g., Devenpeck v. Alford*, 125 S. Ct. 588, 594 (2004) ("Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest."); *id.* at 593 (arrest valid "where there is probable cause to believe that a criminal offense has been or is being committed"); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."); *Whren v. United States*, 517 U.S. 806, 819 (1996) (embracing "traditional common-law rule that probable cause justifies a search and seizure").

Second, this Court has consistently held that the probable cause sufficient to justify an arrest is an objective measure. *See, e.g., Ornelas v. United States*, 517 U.S. 690, 696 (1996) (question "whether the[] historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to ... probable cause"); *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (probable cause exists if at the time of the arrest "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had

committed or was committing an offense"); *see also Saucier*, 533 U.S. at 207 (quoting *Beck*'s objective standard); *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (per curiam) (same).

The third principle – really just a corollary of the second – is that "subjective considerations" play no role whatsoever in the probable-cause calculus. *Whren*, 517 U.S. at 814; *see also id.* at 813 ("subjective intent" irrelevant) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)); *id.* at 814 (same); *Devenpeck*, 125 S. Ct. at 594 ("subjective reason[s]" irrelevant); *id.* at 815 ("subjective intent" irrelevant); *Arkansas v. Sullivan*, 532 U.S. 769, 771-72 (2001) (per curiam) ("subjective intentions" irrelevant); *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) ("subjective thoughts" irrelevant). To put the point slightly differently, "'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" *Whren*, 517 U.S. at 813 (quoting *Scott*, 436 U.S. at 136). Translation: So long as the objective facts before the officer add up to probable cause to arrest, it just doesn't matter what's going on inside the officer's head.

As this Court has said before in summarily reversing this same court of appeals on a similar issue, "[t]he decision of the Ninth Circuit ignores the basic import of these decisions." *Hunter*, 502 U.S. at 227. The court below sought to limit the principle embodied in this Court's probable-cause decisions to one focused solely on "ulterior motives." It is true, the Ninth Circuit said, that "allegations of ulterior motives cannot invalidate police conduct that is justified by probable cause." App. 7a. But, the court said, Agent Gregory's actions "are not impugned because of his motive, but because of his

claimed *knowledge* that [Lee] was not the person named" in the arrest warrant. *Id.*

The distinction between "motive" and (supposed) "knowledge" that underlies the Ninth Circuit's decision is as untenable as it is elusive. It cannot be squared with the letter of this Court's decisions, which excise "subjective considerations" generally from the probable-cause analysis. *See supra* at 7. Nor is the Ninth Circuit's position consistent with the spirit of this Court's decisions eschewing analysis of subjective perceptions. Those decisions seem rather clearly to be driven by two related considerations: first, that police need a clear rule that is easy to apply in the field; and second, that courts need a clear rule that is easy to apply after the fact. *See Whren*, 517 U.S. at 814-15. The rule that this Court's cases establish – that probable cause, understood objectively from the perspective of a reasonable officer, is a sufficient basis for arrest – fits both squarely. The Ninth Circuit's rule – which requires a police officer to pit his own subjective perceptions against the record facts, and then invites a reviewing court to psychoanalyze the officer post hoc – fits neither. Whether a court shrinks an arresting officer's head to flush out his true motives or to discern his supposed "knowledge," it shrinks his head just the same. And that is precisely the result this Court's probable-cause precedents aim to foreclose.[2]

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[2] There is, we should say, no reason to believe that the Ninth Circuit's inquiry into a defendant's subjective perceptions would be limited to cases about the validity of arrests. Suppose a suspect alleged that, despite a mountain of evidence against him, the public prosecutor "actually knew" that he was innocent. Under the logic of its decision here, the Ninth Circuit would presumably find a colorable malicious-prosecution claim, deny qualified immunity, and send that case to a jury, as well.

B. This Court's Decisions Make Clear That Qualified Immunity Is Governed by Objective, Rather Than Subjective, Considerations.

The Ninth Circuit's decision is equally irreconcilable with this Court's qualified-immunity decisions. The court of appeals correctly stated the applicable legal rule: Immunity attaches unless it "'would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" App. 9a (quoting *Saucier*, 533 U.S. at 202). The court then held – and this is where, with respect, it went off the track – that because "[k]nowingly arresting the wrong person" is a "self-evident wrong" and "plainly unlawful," Agent Gregory had no immunity from suit. *Id.* at 10a.

The Ninth Circuit's mistake was in, again, allowing subjective considerations (Gregory's supposed inferences concerning Lee's innocence) to govern the immunity inquiry. As the petition makes quite clear, the *whole point* of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) – the foundational case that ushered in modern qualified-immunity jurisprudence – was to excise subjective considerations from immunity determinations. Before *Harlow*, qualified immunity turned, at least in part, on an officer's "subjective good faith." *Id.* at 816. This "subjective component" of the immunity inquiry circumscribed the officer's "'permissible intentions.'" *Id.* at 815 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The problem, the *Harlow* Court determined, was that the "subjective element" of the qualified immunity defense "frequently ... proved incompatible with" the principle "that insubstantial claims should not proceed to trial" – the reason being that "an official's subjective good faith ha[d] been considered to be a question of fact that some courts ha[d] regarded as inherently requiring resolution by a jury." *Id.* at 815-16.

Because by the time of *Harlow* it was "clear that substantial costs attend the litigation of the subjective good faith of government officials" and because "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-ranging discovery," *id.* at 816-18, the Court charted a fundamentally different course. Specifically, the Court jettisoned reliance on an officer's subjective thought processes in favor of a singular focus on the "objective reasonableness of an official's conduct." *Id.* at 818; *accord id.* at 819 ("objective legal reasonableness"). As the Court has since summarized, *Harlow* "replac[ed] the inquiry into subjective malice [with] an objective inquiry into the legal reasonableness of the official action" and thereby "completely reformulated" qualified immunity doctrine. *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Thus, in the wake of the *Harlow* watershed, qualified immunity has been and is governed by "a wholly objective standard." *Davis v. Scherer*, 468 U.S. 183, 191 (1984). An officer's "subjective beliefs" are categorically "irrelevant." *Anderson*, 483 U.S. at 641.

With all respect, the Ninth Circuit should not be allowed to skirt the very essence of *Harlow* by invoking the truism that "[n]o reasonable officer would believe that he is entitled knowingly to arrest the wrong man pursuant to a facially valid warrant the officer knows was issued for someone else." App. 9a. Indeed, that is exactly the sort of move this Court rejected in *Anderson*. There, the Court clarified that it is not enough that the "relevant 'legal rule'" be clear in the abstract; rather, it must be clearly established "in a more particularized, and hence more relevant sense." 483 U.S. at 639-40. Specifically, this Court held, it must be that "a reasonable official would understand that *what he is doing* violates" the right asserted by the plaintiff. *Id.* at 640 (emphasis added). The

question here, therefore, is not whether an officer could, as a philosophical matter, think it permissible "knowingly to arrest the wrong man." Instead, the question is whether, "in the situation he confronted," *Saucier*, 533 U.S. at 202, and based on "the information [he] possessed," *Anderson*, 483 U.S. at 641, it was objectively legally reasonable" for Agent Gregory to conclude that his arrest of Lee was lawful, *id.* at 641.

There is a final immunity-related point worth making – a perverse irony of sorts that demonstrates the wrongheadedness of the Ninth Circuit's decision. As noted above, in the years before *Harlow*, the qualified-immunity standard embodied a "subjective component" that "refer[red] to 'permissible intentions.'" *Harlow*, 457 U.S. at 815 (quoting *Wood*, 420 U.S. at 322). Specifically, immunity was denied under the subjective prong if an officer had a "*malicious intention*." *Id.* (quoting *Wood*, 420 U.S. at 322) (emphasis in original). *Harlow*, again, changed all that; it eliminated the subjective inquiry and thus expressly held that not even "allegations of malice" would suffice to subject government officials to suit. *Id.* at 817. The Ninth Circuit's decision here sets the world on its head (and does the pre-*Harlow* law one better) by denying immunity based on an allegation *not* of intentional bad-faith or malice, but of "knowledge." Knowledge, of course, is a *less* culpable mental state than intent or malice. *See generally* Model Penal Code §2.02(2). So, not only has the Ninth Circuit re-injected subjectivity into the qualified-immunity analysis, it has managed to hold that a state of mind (supposed knowledge) that would have been insufficient to defeat immunity even in the pre-*Harlow* days is now, post-*Harlow*, somehow sufficient. That cannot possibly be correct.

III. The Ninth Circuit's Reliance on Subjective Considerations To Defeat Qualified Immunity Fatally Undermines the Public Policies That Animate Qualified Immunity Doctrine.

The practical implications of the Ninth Circuit's decision are very real. The principles that underlie both the Fourth Amendment and qualified immunity are specifically designed to account for the fact that public officials – and particularly police officers – often must act on a moment's notice in fluid situations. With respect to the Fourth Amendment, this Court has observed, for instance, that officers often act "on the spur (and in the heat) of the moment." *Atwater*, 532 U.S. at 347. So, too, in the qualified-immunity context, the Court has emphasized that there is a risk that "fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). The point, for present purposes, is that if police believe they will face a Fourth Amendment claim – and lose the protection of qualified immunity – every time that a suspect can *allege* that an arresting officer "actually knew" that he was innocent (App. 8a), they will hesitate in the execution of their official functions. That hesitation, that indecision, is precisely what this Court's decisions have sought to prevent.

In the same vein, the Ninth Circuit's ruling effectively guts the qualified immunity defense. A suspect can *always* allege – "contend[]," as the court of appeals said – that the arresting officer "actually knew" that he was innocent. App. 8a. And, indeed, there will almost always be some shred of evidence to which the suspect could point to support such an allegation. Police work is a messy business; it is rarely cut-and-dried. As the petition

says, "[w]here an innocent person is arrested, it is virtually inconceivable that the police will have been wholly unaware of any circumstances suggesting that they had the wrong individual." Pet. at 25. Under the Ninth Circuit's decision, the mere allegation of officer knowledge, however weakly supported, creates a fact question concerning the officer's subjective perceptions – whether he actually believed that he was arresting an innocent individual. In all such cases – which could well be *all* cases – the Ninth Circuit would deny qualified immunity and send the matter to a jury.

That, again – we are repeating ourselves here – is precisely the result this Court's decisions have endeavored to avoid. In *Harlow* itself, this Court emphasized – in refocusing qualified immunity exclusively on objective considerations – that "'[i]t is not difficult for ingenious plaintiff's counsel to create a material issue of fact" where "a decisionmaker's mental processes are involved.'" 457 U.S. at 817 n.29 (quoting *Halperin v. Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979), *aff'd by an equally divided Court*, 452 U.S. 713 (1981)). And in *Hunter v. Bryant*, in the course of summarily reversing the Ninth Circuit for "ignor[ing] the import" of *Harlow* and its progeny, this Court emphasized that while it had made clear that "[i]mmunity ordinarily should be decided by the court long before trial," the lower court's treatment of probable cause (the same issue involved here) "routinely place[d] the question of immunity in the hands of a jury." 502 U.S. at 227-28. The point, fundamentally, is that if every suspect's allegation that his captor "actually knew" that he was innocent defeats immunity and requires a trial, it is no overstatement to say that "the protections of qualified immunity are all but lost." Pet. at 27.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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